Petitioner N.P

Miscellaneous No. 345, October Term 1947,
now
Miscellaneous No. 1, October Term 1948.

In the Supreme Court of the United States

GRACE W. ADKINS AS ADMINISTRATRIX OF THE ESTATE OF P. V. ADKINS, DECEASED,
Petitioner,
vs.
E. I. DU PONT DE NEMOURS & COMPANY, INC.,
Respondent;
THE UNITED STATES OF AMERICA, ***Intervener.***

BRIEF OF E. I. DU PONT DE NEMOURS & CO., INC., RESPONDENT.

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INDEX.

TABLE OF CASES.

STATUTES.

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Statement.

We believe that a brief statement concerning the proceedings had in the trial court would be of assistance to this Court.

P. V. Adkins, now deceased, commenced this action in the United States District Court for the Northern District of Oklahoma under the Fair Labor Standards Act of 1938, to recover for alleged overtime and liquidated damages

claimed to be due for work, labor and services rendered to respondent in what is commonly known as the Oklahoma Ordnance Works near Choteau, Oklahoma, for the production of munitions of war. In the original action there were approximately 650 claimants.

P. V. Adkins, as agent of this group of claimants, after the original action had been pending for some time, and after consultation with the judge of the trial court, decided to take a cross-section of twelve claimants who worked in different departments of the Oklahoma Ordnance Works, and make a test case of the various issues involved in these several cases. This was accordingly done. This cause came on before a special master. A large amount of proof was introduced comprising seven typewritten volumes. The special master, after hearing the evidence, argument of counsel, together with written briefs, made findings of fact, conclusions of law, and his recommendations to the trial court. The special master concluded that under the doctrine of *de minimus non curat lex* and the doctrine of non-retroactivity the plaintiffs could not recover and recommended their claims be denied. Both plaintiffs and respondent filed objections to the report of the special master. Before this report of the special master came on for hearing the Portal-to-Portal Act of 1947 was passed and approved by the President of the United States. The respondent set up in an amendment to its answer that the Portal-to-Portal Act of 1947 barred the plaintiffs in this cause and prayed that the action be dismissed at the cost of the plaintiffs.

The plaintiff, P. V. Adkins, died and his wife as administratrix was substituted as party plaintiff. Plaintiff countered with an attack on the constitutionality of the Portal-to-Portal Act of 1947. The United States Government, on account of the attack on the constitutionality of

the Portal-to-Portal Act of 1947, was permitted to intervene. Briefs were filed, and when the cause came on for argument the trial court held that the Portal-to-Portal Act of 1947 was constitutional and dismissed the action on the ground that the trial court was without jurisdiction to proceed further except to dismiss the action. (Appendix, page 29.) This action was based solely on the Fair Labor Standards Act of 1938. The plaintiff gave notice of her intention to appeal to the Circuit Court of Appeals for the Tenth Circuit and then requested the trial court to require respondent to pay the cost of making up the record on appeal. Plaintiff sought to include in the record on appeal not only all of the pleadings, but likewise the briefs, the evidence taken before the special master, the special master's report, and any and all papers in connection with the case, notwithstanding the fact that the report of the special master had never been passed on by the trial court. In effect, counsel for plaintiff are seeking to force respondent to pay for a tremendous record, which alone the trial court must consider in the event this Court holds that the trial court was in error in holding the Portal-to-Portal Act of 1947 constitutional and dismissing the case. Both the trial court and the Circuit Court of Appeals for the Tenth Circuit denied the application of the plaintiff to appeal *in forma pauperis*.

We believe that it is essential to any discussion of the issues involved herein that this Court have before it certain portions of the record in the trial court. We have accordingly caused to be printed, and submit herewith, an appendix of the pleadings and the judgment of the trial court. We ask that this apendix be considered as a part of the record in this Court.

Counsel for petitioner assert in their brief, page 1, that

this action was based on contract. We take issue with that statement and ask the Court to refer to the original complaint filed in this cause (Appendix, page 1). It was based solely on the Fair Labor Standards Act of 1938.

On page 2 of their brief counsel for petitioner assert that the court allowed the special master $9,000.00. This is in error. It was $6,000.00. (See Appendix, page 34.)

Counsel for petitioner further assert that the cost of the record on appeal would be around $4,000.00. We have set out in our appendix what we consider essential to review any alleged error of the trial court in passing upon the constitutionality of the Portal-to-Portal Act of 1947, holding the same constitutional and dismissing the cause in the trial court. The cost of appeal in this case on the essential portions of the record is nominal. We are at a loss to understand why counsel for petitioner seeks to include in a record on appeal matters which have never been passed upon by the trial court. They are simply attempting to reduce the Circuit Court of Appeals to the status of a trial court of first instance, and to place a useless burden of expense on the Federal Government.

We have examined the brief submitted by counsel for petitioner very carefully and we believe it is wholly without merit, and on the brief for petitioner alone, the application for certiorari should be denied.

ARGUMENT.

The essential issue involved in this proceeding is whether or not the petitioner and the claimants she represents are entitled to appeal from the United States District Court for the Northern District of Oklahoma to the Circuit Court of Appeals of the Tenth Circuit *in forma pauperis.* The questions of law presented may be analyzed under the following proposition:

THE PETITIONER HEREIN AND LITIGANTS WHOM SHE REPRESENTS ARE NOT ENTITLED TO APPEAL IN FORMA PAUPERIS.

(a) Petitioner and litigants for whom she prosecutes this action have not brought themselves within the terms of Title 28, F. C. A., Section 832, providing for appeals *in forma pauperis;*

(b) Any contract between attorney and client or clients under the Fair Labor Standards Act of 1938, which provides that the attorney, or attorneys, may as a part of their fees, share in any part of the recovery, except a reasonable attorney's fee to be fixed by the court, is void as against public policy.

(c) Under the provisions of Title 29, F. C. A., Section 216, the attorney's fee provided for is contingent upon recovery of a judgment on behalf of the plaintiff, or plaintiffs, and before an appeal can be taken *in forma pauperis,* the attorney, or attorneys, must bring themselves within the terms of Title 28, F. C. A., Section 832, *supra.*

We will discuss these subdivisions of our proposition in the order named.

(a) Petitioner and litigants for whom she prosecutes this action have not brought themselves within the terms of Title 28, F. C. A., Section 832, providing for appeals *in forma pauperis*.

The Court should bear in mind that the twelve persons who appeared as plaintiffs in this cause in the trial court, now represented in this application by the administratrix as petitioner, are not the only ones directly interested in this proceeding. Counsel for petitioner in the petition for certiorari herein, page 2, admit that, including the twelve plaintiffs in this cause, there are 650 claimants represented by them in this cause and in cause No. 1720 Civil in the United States District Court for the Northern District of Oklahoma.

Petitioner has made as a part of her application for certiorari as Exhibit A attached thereto, the second application filed in the Circuit Court of Appeals for the Tenth Circuit, asking leave to appeal *in forma pauperis*. The Circuit Court of Appeals denied this second application. The petitioner now asks this Court to review and reverse the ruling of the Circuit Court of Appeals refusing to authorize an appeal *in forma pauperis*. In the second application, addressed to the Circuit Court of Appeals for the Tenth Circuit, petitioner made the following admissions:

> "One of the persons whose wage-hour claim is involved in this case, namely, V. J. Blevins, refuses to advance or secure the costs of this appeal and refuses to execute an affidavit *forma pauperis* therefor, with the assertion by him that, 'I guess you will have to go on without me.' • • • "

The affidavit made by petitioner's counsel, John W. Porter and John W. Porter, Jr., which is attached to peti-

tioner's second application to appeal *in forma pauperis* as a part of Exhibit A-1, is as follows:

"Jno. W. Porter and John W. Porter, Jr., each of lawful age and being first duly sworn upon oath, state: We are the sole members of the law firm of Porter & Porter which is a law partnership with offices at 630 Equity Building in Muskogee, Muskogee County, State of Oklahoma, and each of us is a citizen of said city, county and state and also a citizen of the United States of America. Said law firm is the counsel of record in and representing the plaintiff in the above entitled and numbered action, wherein plaintiff is trying to appeal *in forma pauperis* from an adverse decision of the trial court therein. The clerk's office of said court has estimated that the costs of such appeal will be around $4000. Plaintiff's cause of action in said cause is for the recovery of unpaid wage-hour claims and damages by reason of certain labor employments consummated at what is known as the Oklahoma Ordnance Works near Pryor, Oklahoma, all as more particularly appears in the record of this case, and we feel that said cause of action is meritorious and that plaintiff should recover. The total liquid assets of said law firm does not exceed $2000, and even though said law firm accepted employment as counsel for plaintiff in this case, it has always been true and yet is that the said John W. Porter, Jr., has done and is expected to do substantially all of the work done or contemplated by said employment, and for that reason the said Jno. W. Porter and said law firm have waived and assigned to the said John W. Porter, Jr., all of any right, title and interest that may ever become due or payable to said law firm or said Jno. W. Porter or either of them by reason of said employment or by reason of any work done or contemplated by them or either of them concerning this case. The said Jno. W. Porter and said law firm and each of them now reaffirms said waiver and assignment, and the said John W. Porter, Jr., has accepted said waiver and

assignment and now reaffirms such. The said John W. Porter, Jr., has all of the right, title and interest in and to any and all fees and considerations that may ever be due or payable by reason of said employment of counsel or plaintiff in said action and prosecuting said cause, but because of his poverty the said John W., Porter, Jr., is unable to pay or give security for said costs of appeal and still be able to provide himself and his dependents with the necessities of life. * * *"

It will be observed that this is a mere subterfuge between counsel for petitioner, because John W. Porter, Sr., did not make an affidavit that he could not furnish the costs or the necessary security for costs. We deem it unnecessary to discuss this affidavit further. It is definitely not in compliance with Title 28, F. C. A., Section 832.

In view of the admissions made by counsel in the second application to the Circuit Court of Appeals to appeal *in forma pauperis*, there was nothing else for the Circuit Court of Appeals to do except deny the application.

The principle is well settled that,

> "The affidavit of an administratrix who is suing for damages for the wrongful death of her husband, must show that neither the estate nor the beneficiaries of the action are able to prepay or secure the costs."
>
> —*Clay* v. *Southern R. Co.*, (C. C. A. 6) 90 Fed. 472;
> *Reed* v. *Pennsylvania Co.*, (C. C. A. 6), 111 Fed. 714;
> *Boggan* v. *Provident Life & Acc. Ins. Co.*, (C. C. A. 5) 79 F. (2d) 721.

We believe that this record clearly discloses that the petitioner, the attorneys and plaintiffs interested in the prosecution of this cause wholly fail to bring themselves within the terms of Title 28, F. C. A. Section 832, relating to appeals *in forma pauperis*, and the order of the Circuit

Court of Appeals denying both applications should be affirmed and the petition for certiorari denied.

We come now to consider our second subdivision.

(b) Any contract between attorney and client or clients under the Fair Labor Standards Act of 1938, which provides that the attorney, or attorneys, may as a part of their fees, share in any part of the recovery, except a reasonable attorney's fee to be fixed by the court, is void as against public policy;

We endeavored to procure a copy of the contract between counsel for petitioner and the various plaintiffs in this cause, but counsel for plaintiffs refused to furnish us a copy of their contract. (Appendix, pages 35, 36, 37). We are unable to say whether the contract between counsel for petitioner and plaintiffs in this cause whom she represents, is contingent or otherwise. We assume that it is contingent or counsel would not refuse to furnish counsel for respondent with a copy.

We are definitely of the opinion that any contract between an attorney and client for attorneys' fees in the prosecution of a claim under the Fair Labor Standards Act of 1938, Title 29, F. C. A., Section 216, by the terms of which the attorney is to receive any part of the recovery of the claimant under the Fair Labor Standards Act, is void as against public policy. The provision in the Act covering attorneys' fees, Title 29, F. C. A. Section 216, we here quote:

> "* * * The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

We note that the statute specifically provides that in such action, in addition to any judgment awarded the plain-

tiff, or plaintiffs, that the court is to allow a reasonable attorneys' fee. The language is too clear to need a lengthy discussion. The purpose of the Act is to protect the laborer, so that whatever he recovers in case of recovery would be net to him, or to her, as the case may be.

This Court, so far as we are able to ascertain, has never passed directly on the question of whether a contingent contract between attorney and client under the Fair Labor Standards Act is void or valid.

In the case of *Sykes* v. *Lochman*, (Kan.) 132 P. (2d) 620, the Kansas Supreme Court had under consideration the construction of the Fair Labor Standards Act of 1938. From this case we quote the sixth paragraph of the syllabus:

> "The section of the Fair Labor Standards Act providing that the court shall in addition to any judgment awarded plaintiffs allow a reasonable attorney's fee contemplates that an employee shall receive full amount of any award made to him, and any contract that would allow an attorney any part of the award made to any employee would be void."

Petition for writ of certiorari was filed in this Kansas case and denied, 319 U. S. 753, 87 L. ed. 1707.

The fact that this Court denied a petition for certiorari in the *Sykes* v. *Lochman* case, *supra*, was, we consider, tantamount to a holding that a contract between an attorney and client in a contingent portion of the client's recovery under the Fair Labor Standards Act, is against public policy and void.

In the case of *Harrington* v. *Empire Const. Co.*, (C. C. A. 4) 167 F. (2d) 389, the court had under consideration the construction of the Fair Labor Standards Act. One question was as to whether an attorney could take the full

amount of the fee fixed by the court where the claimants were successful, and then require the claimants to pay an additional fee to the attorney by special contract. In discussing the question the court in the fourth paragraph of the syllabus states:

> "In an action by an employee under Fair Labor Standards Act wherein an allowance is made of attorney fees, court has sufficient control over attorney as an officer of court to require him to surrender any claim he may have for an additional fee under a private agreement as a condition of receiving fee allowed by judgment of court. Fair Labor Standards Act of 1938, Sec. 16, 29 U. S. C. A., Sec. 216."

And in the body of the opinion the court says:

> "It is true that the statute does not forbid the attorney to make a private agreement with his client nor forbid an employee to compensate his attorney in case the suit is unsuccessful; but it seems to us too clear for argument that Congress did not intend the court to fix a fee sufficient to compensate the plaintiff's attorney for all of his services and to permit him to collect an additional fee from his client under a private agreement. Such an arrangement would require the cooperation of the court in the frustration of the Congressional purpose. * * *"

This Court in the case of *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 89 L. ed. 1296, which was consolidated with two other cases, *Dize* v. *Lake Maddrix*, and *Arsenal Building Corporation and Spear & Co., Inc.*, v. *Meyer Greenburgh*, had under consideration the construction of certain provisions of the Fair Labor Standards Act of 1938, 29 U. S. C. A., Section 216, which contains among others the following provision:

> "* * * shall be liable to employee or employees af-

fected in the amount of their unpaid minimum wages or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages."

Questions were raised by the litigants as to the right of an employee subject to the terms of the Act to waive or release his right to receive from the employer liquidated damages under Section 16-B, and likewise whether an employee is entitled to interest on sums recovered as wages and liquidated damages under that section.

These consolidated cases were thoroughly briefed and argued to this Court by numerous able lawyers. The court, speaking through Mr. Justice REED, used the following language:

"It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. * * * Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

* * * * * * * * *

"The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate com-

merce. To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employer subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

"We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Transp. Co.* v. *Missel,* 316 U. S. 572, 86 L. ed. 1682, 62 S. Ct. 1216. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date. The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that

waiver of liquidated damages is called for. This conclusion is in accord with decisions of the majority of the Federal courts that have considered this question."

After discussing the public policy of the Fair Labor Standards Act in detail this Court held:

> "Neither the right of an employee under the Federal Fair Labor Standards Act of 1938 to the basic statutory minimum wage nor to statutory liquidated damages for its nonpayment can be waived by him."

And likewise held that the employee is not entitled to interest on sums recovered for minimum wages and liquidated damages under the Fair Labor Standards Act.

By the plain and unambiguous terms of the Act a reasonable attorney's fee is provided for the attorney for the claimant if he succeeds in establishing his or her claim. As construed by this Court in *Brooklyn Savings Bank* v. *O'Neil, supra,* it was the policy and intention of Congress that the claimant should be protected in the interest of public welfare. Claimant cannot waive the basic statutory minimum wage nor the statutory liquidated damages as against the employer for non-compliance with the Act. If the claimant under the Fair Labor Standards Act cannot waive the provisions of the Act providing for minimum wages and liquidated damages, by the same excellent reasoning the claimant cannot waive the provisions relating to attorney's fees, and any attempt on part of attorney or client by contract or otherwise to waive or change such provision is against public policy and void.

It is respectfully submitted that any contract between attorney and client under the Fair Labor Standards Act, in which it is agreed between attorney and client that in case of recovery under the Fair Labor Standards Act the

attorney is to have any part of the recovery in favor of the claimant, is to that extent void as against public policy and of no force and effect.

We come now to consider our third contention:

(c) Under the provisions of Title 29, F. C. A., Section 216, the attorney's fee provided for is contingent upon recovery of a judgment on behalf of the plaintiff, or plaintiffs, and before an appeal can be taken *in forma pauperis*, the attorney, or attorneys, must bring themselves within the terms of Title 28, F. C. A., Section 832, *supra*.

As above noted, we have been unable to procure a copy of the contract between petitioner, and claimants or plaintiffs whom she represents, and attorneys for petitioner. Any attorneys' fee recovered by attorneys for petitioner and the litigants represented by her in this action are contingent on this: That before such attorneys can recover any compensation they must win the case for petitioner and those for whom she is acting as agent, otherwise attorneys for petitioner cannot recover any attorneys' fees in this action.

> "'Contingent' means liable to occur, and designates an event which may occur, or expresses the quality of being casual, or the possibility of coming to pass; it includes all anticipated future events which are not certain to occur, and possibilities which prudent men know may happen, though there may not necessarily be known indications of them apparent."
>
> —*Scot' v. City of Jamestown*, 217 N. W. 668, 56 N. D. 454.

> "'Contingent' is the quality of being casual; the possibility of coming to pass; an event which may occur; a possibility; a casualty. All anticipated future events which are not certain to occur are 'contingent' events, and may be properly denominated mere 'pos-

sibilities,' more or less remote, while anticipated events which are certain to occur, or must necessarily occur, are in no degree 'contingent'."

—*Verdier* v. *Roach*, 96 Cal. 467, 31 Pac. 554, 556.

The right of an attorney who represents a claimant under the Fair Labor Standards Act is clearly contingent upon recovery, and being contingent, in order to appeal *in forma pauperis* under Title 28, F. C. A., Section 832, it is necessary that all interested parties make affidavits, as required by said statute, showing their inability to make a cash deposit or secure the necessary costs, and in addition thereto that they have a meritorious claim on appeal.

Here we have a case where one of the attorneys who appears for petitioner in this cause has neglected and failed, and still neglects and fails, to come forward and make the affidavit as prescribed by Title 28, F. C. A., Section 832, page 520, in order to appeal *in forma pauperis*. Such conduct is non-compliance with the statute. We quote:

"The sworn statement required by this section must show that plaintiff is a citizen and that there is no person interested who is able to pay or secure the costs. Counsel taking suits on a contingent basis should be made responsible for costs, and should also make affidavit of inability. *Boyle* v. *Great Northern R. Co.*, (C. C. Wash.) 63 Fed. 539; *Feil* v. *Wabash R. Co.*, (C. C. Mo.) 119 Fed. 490; *Phillips* v. *Louisville & N. R. Co.*, (C. C. Ala.) 153 Fed. 795; *Esquibel* v. *Atchison, T. & S. F. R. Co.*, (D. C. N. M.) 206 Fed. 863; *U. S.* v. *Ross*, (C. C. A. 6) 298 F. 64, 33 A. L. R. 728; Bennington, (D. C. Ohio) 10 F. (2d) 799; *Chetkovich* v. *U. S.*, (C. C. A. 9) 47 F. (2d) 894; *DeHay* v. *Cline*, (D. C. Tex.) 5 F. Supp. 630. Contra, *U. S.* v. *Call*, (C. C. A. 5) 287 Fed. 520; *Clark* v. *U. S.*, (D. C. Mo.) 57 F. (2d) 214, overruling 47 F. (2d) 894; *Deadrich* v. *U. S.*, (C. C. A. 9) 67 F. (2d) 318. Aff'd, 74 F. (2d) 619; *Quittner* v. *Motion*

Pictures Producers & Distributors of America, Inc., (C. C. A. 2) 70 F. (2d) 331." (28 F. C. A., Sec. 832, p. 520.)

"Under the statute the affidavit as to the poverty of the applicant is to be made by himself, and not by another, even his counsel. A supporting affidavit may properly be made by the counsel, but the importance that he who is seeking the privilege accorded by the statute should be required to expose himself to the pains of perjury in a case of bad faith is plain."

—*Pothier v. Rodman*, 261 U. S. 307, 67 L. ed. 670.

It thus appears that since the claim of counsel for petitioner for compensation is contingent upon recovery of petitioner and those for whom she acts as agent, each counsel for petitioner must make an affidavit that he is not able to put up the necessary costs or give the necessary security for costs of an appeal to come within the provisions of Title 28, F. C. A., Section 832, regulating appeals *in forma pauperis*.

In conclusion, it is respectfully submitted that the petitioner has failed to point out on behalf of the plaintiffs that she has a meritorious right of appeal; that she has wholly failed to bring herself and those for whom she acts within the terms of the statutes providing for appeal *in forma pauperis;* that any contract between an attorney and client under the Fair Labor Standards Act which provides that the attorney may receive as his compensation any part of the recovery by the claimant, is against public policy and void; that attorneys' fees under Title 29, F. C. A., Section 216, are contingent upon recovery, and in order for a plaintiff or plaintiffs to appeal *in forma pauperis* the attorneys must join with their client in making affidavits in order to bring themselves within the terms of the statute providing for appeals by poor persons; that this application

for certiorari should be denied and dismissed at the cost of the petitioner.

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Attorneys for E. I. du Pont de Nemours & Company, Inc., Respondent.

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APPENDIX TO BRIEF OF RESPONDENT, E. I. DU PONT DE NEMOUS & COMPANY, INC.

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INDEX.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF THE STATE OF OKLAHOMA.

No. 1816 Civil.

P. V. Adkins as agent for J. R. Adcock, W. C. Brewster, V. J. Blevins, T. F. Holmes, W. A. Heape, J. A. Hodges, R. Kanard, R. E. Ladd, C. Rogers, Jr., W. M. Renner, V. R. Willis, C. Snodgrass, Plaintiffs, *vs.* E. I. du Pont de Nemours & Company, Inc., Defendant.

COMPLAINT.

Come now the plaintiffs as so designated in the caption thereof, and for cause of action against the defendant as so designated in the caption hereof, allege and state, that at all times herein mentioned:

1. This action is brought under and pursuant to the Fair Labor Standards Act of 1938 (Title 29 U. S. C. A., Secs. 201-219), and Executive Order No. 9240 as amended (Title 40 U. S. C. A., following Sec. 326) for all unpaid overtime compensation and damages and attorney's fees that may be due and unpaid to plaintiffs and each of them from defendant by reason of their respective employment by defendant in or around a plant and place of business operated by defendant and located near Pryor in Mayes County, Oklahoma, at all times since January 1, 1942.

2. This action is also brought under and pursuant to said Act and said Executive Order for such unpaid overtime compensation and damages and attorney's fees for and on behalf of all other such present or former employees who appoint and authorize said P. *B.* Adkins as agent to institute and prosecute such action in their behalf against de-

fendant or intervene as plaintiff in their behalf in this action with the permission of the court so to do.

3. Said P. V. Adkins has been appointed and authorized by each of the other parties named in the caption hereof as plaintiffs to institute and prosecute this action for and on their behalf.

4. Defendant is a foreign corporation authorized to do the business in Oklahoma hereinafter mentioned, and is engaged in the business of production and manufacture of gunpowder, T. N. T., and other explosives and related products in and around said plant and place of business for shipment in interstate commerce and for the United States Government in its prosecution of what is generally known as World War No. 2, and in the shipment of all such products to points and places outside the State of Oklahoma, and that all of said production and products or a major portion thereof were shipped in interstate commerce.

5. Defendant, in its operation of said business, employed plaintiffs in and plaintiffs devoted all of their working time to, except as hereinafter set out, the construction, operation, maintenances, inspection, protection, care, and repair of the tools, machinery, equipment, and building used in said production, also the handling, care, protection, and inspection of said products and the materials used therefor, and also the clerical work necessary to the conduct of said business.

6. Said plant and place of business is in constant operation day and night, most of plaintiffs being employed and working there alternately seven days at a time on each of the three work shifts there known as "swing shifts," and some of plaintiffs being so employed by defendant and working there on the work shift there known as the "regular day shift," and some of plaintiffs being so employed by defendant and working there on the work shifts there known as "patrol swing shifts" of which there were three.

7. Due to the hazardous nature of defendant's said business it required a wide dispersal of buildings and pro-

duction units and special clothing and washing facilities and special regulations and safety rules for said employees, and plaintiffs were required by defendant to and did check in and start their respective duties for defendant at said plant and place of business from 30 to 60 minutes each time before their respective shifts were schedules to commence operations on said production, and were so required to and did check back out and cease their respective production shift duties for defendant there from 10 to 40 minutes each time after their respective shift was scheduled to cease operations on said production. This time on duty before and after shifts, amounting to at least one hour per workday per employee, was spent by plaintiffs in reporting in and out by defendant's time clocks and time cards at defendant's entrances to said plant and place of business, being searched by defendant for the safety of all concerned and said plant and place of business, waiting on and using transportation furnished by defendant in transporting plaintiffs in going to and from the widely dispersed buildings and places of work operated by defendant in said plant and place of business, changing to and from special clothing required by defendant to be used and left at said plant and place of business each workday for reasons of safety, washing the chemicals and other dangerous matter from their bodies for reasons of safety, and in going to and from their assigned places of work and operation within the boundary of said plant and place of business, all of which are conditions of and a part of their respective employments with defendant and said time is therefore in fact time worked within the contemplation of the laws sued under. That said reasons of safety and others are based on regulations and safety rules of defendant enforced through disciplinary action by defendant on plaintiffs from the times plaintiffs so checked in on defendant's said premises until the times they so checked back out, not only for the safety and protection of all persons and property concerned but also for the more efficient operation of defendant's said business.

8. The operational schedule for the "swing shifts" is from 12 o'clock midnight to 8 o'clock a. m., from 8 o'clock a. m. to 4 o'clock p. m. and from 4 o'clock p. m. to 12 o'clock midnight, every day; and for the "regular day shift" it is from 8 o'clock a. m. to 4:30 o'clock p. m. each day with Sundays off; and for the "patrol swing shifts" it is from thirty minutes before each "swing shift" schedule until thirty minutes after each "swing shift" schedule.

9. The plaintiffs who worked either the "swing shifts" or the "patrol swing shifts" worked seven consecutive days on each such shift with no relief or time off for eating, and had a rest period before reporting back for duty on another such shift, but during each seven successive calendar weeks they never had more than three days of rest, and said shifts were scheduled and posted by defendant on bulletin boards within said plant for as much as a year in advance. After working the 4 o'clock p. m. to 12 o'clock "midnight swing shift" or the corresponding "patrol swing shift" for seven consecutive days and after a rest period, these plaintiffs would then work the 8 o'clock a. m. to 4 o'clock p. m. "swing shift" or corresponding "patrol swing shift" for seven consecutive days, and after another rest period would then work the 12 o'clock midnight to 8 o'clock a. m. "swing shift" or corresponding "patrol swing shift," and such rotation of work on such shifts thus continued and these plaintiffs worked such alternate "swing shifts" or "patrol swing shifts" for the duration of their respective employment or until transferred to another schedule by defendant. These plaintiffs state that these "swing shifts" and "patrol swing shifts" constituted their respective regular scheduled workweeks within the contemplation of the laws sued under, and that they should have been paid for time worked on the seventh consecutive workday in each such workweek at a rate of double their respective regular hourly rates of pay. These plaintiffs were not paid for any of the work time set out in paragraph 7 above and they were paid only their respective regular hourly rates of pay for the production shift time hours worked on

the seventh such consecutive day, leaving wholly unpaid and due 6 overtime hours per workweek worked at one and one-half times their respective regular hourly rates of pay and one over-time hour each such seventh consecutive workday worked at double their respective regular hourly rates of pay and 8 overtime hours on each such seventh consecutive workday worked at their respective regular hourly rates of pay for each such hour, for each such plaintiff.

10. The plaintiffs who worked the "regular day shift" worked six days each week with thirty minutes each day off for lunch with each Sunday as their day of rest, all of which constituted their respective regularly scheduled workweeks within the contemplation of the laws sued under. These plaintiffs were not paid for any of the work time set out in paragraph 7 above, leaving wholly unpaid and due 6 overtime hours per week so worked at one and one-half times their respective regular hourly rates of pay for each such week worked, for each such plaintiff.

11. Plaintiffs' respective names and Social Security Numbers, plant badge numbers required for identification and accounting in said business, dates their respective employments started as to their various respective rates of pay, number of their said workweeks involved as to "swing shifts" (ss) or "regular day shift" (ds) or "patrol swing shifts" (ps), their respective regular hourly rates of pay, and the respective amounts of compensation and damages claimed, regarding their respective employments with defendant as herein alleged, are as follows:

Names and Social Security Numbers.	*Badge numbers.*	*Dates started.*	*Workweeks involved.*	*Hourly pay rates.*	*Amounts claimed.*
J. R. Adcock 445-05-3246	C-375	7-17-42	138 (ss)	91c	$3516.24
W. C. Brewster 443-07-9816	C-492	7-17-42	22 (ss)	75c	462.
		1- 1-43	23 (ss)	83c	511.28
		7- 5-43	44 (ss)	91c	1121.12
		7-14-44	42 (ss)	99c	1164.24

Names and Social Security Numbers.	*Badge numbers.*	*Dates started.*	*Workweeks involved.*	*Hourly pay rates.*	*Amounts claimed.*
V. J. Blevins	M-3159	7-27-42	30 (ss)	72c	604.80
446-09-7210	M-1303	3-27-43	26 (ss)	96c	748.88
	M-6159	10-27-43	19 (ss)	1.16	617.12
		3-27-44	63 (ss)	1.36	2399.04
		8-14-45	15 (ss)	1.49½	627.90
T. F. Holmes	M-1385	5-20-42	11 (ss)	60c	124.80
448-09-9701	D-753	8- 6-42	23 (ss)	83c	534.52
	D-2309	2- 1-43	44 (ss)	91c	1121.12
	M-1364	2- 1-44	67 (ss)	99c	1857.24
OSR	11445	8-15-45	11 (ss)	1.05	323.40
W. A. Heape	M-6063	7- 7-42	19 (ds)	72c	383.04
442-03-9494	M-5089	12- 7-42	19 (ds)	96c	501.72
P-235	P-125	5-15-43	114 (ss)	1.16	3702.72
J. A. Hodges	M-5012	7- 8-42	134 (ss)	1.39	5215.
459-10-6174	M-1240 M-1284				
R. Kanard	M-3114	8- 6-42	30 (ds)	1.28	967.68
447-12-9116		3-18-43	47 (ds)	1.31	1723.96
		4-12-44	40 (ds)	1.41	1223.88
R. E. Ladd	D-1613	8-13-42	12 (ss)	75c	252.
446-09-7391	X-3111	11-15-42	12 (ss)	85c	285.60
	Z-95	2-20-43	12 (ss)	87c	292.32
		5-20-43	24 (ss)	95c	638.40
		11- 1-43	83 (ss)	83c	1928.94
C. Rogers, Jr.	A-11	6-24-42	142 (ss)	1.03	4095.28
443-07-8732	T-2007				
W. M. Renner	M-5007	7- 1-42	149 (ds)	1.36	5673.92
441-05-8453					
C. Snodgrass	S-4354	8-12-42	11 (ps)	75c	231.
443-07-5906	M-5100	11- 9-42	13 (ps)	88c	320.32
	M-1339	3- 1-43	22 (ps)	94c	301.20
		8-23-43	42 (ss)	96c	1128.96
		7- 3-44	44 (ss)	1.19	1466.08
		7-31-45	7 (ss)	1.39	272.44
		9- 3-45	10 (ps)	1.49½	224.25
V. R. Willis (Dorris)	D-9224	11- 9-42	88 (ss)	75c	1680.
448-12-1854	D-8132	8-14-44	24 (ss)	87c	584.60
	Z-8097				

12. Said P. V. Adkins is during the times mentioned an employee of the defendant in said plant and place of business, and has a claim against defendant similar to those herein set out, the establishment and collection for which is being prosecuted in case No. 1720-Civil now in litigation before this Court.

Wherefore, premises considered, plaintiffs pray judgment against the defendant for the respective amounts above claimed or for whatever amounts may be found due as to each claimant party plaintiff, and for a reasonable attorney's fee with respect to each successful claimant party plaintiff, and for the costs of this action and such other and further relief as to the court may seem just and proper.

P. V. Adkins,
P. V. Adkins as agent for the within and foregoing named claimant parties plaintiff.

State of Oklahoma, County of Tulsa—ss:

P. V. Adkins, of lawful age being first duly sworn upon oath, states: I am the person named in the caption of the above and foregoing complaint as agent for the other named parties plaintiff herein, and I have read said complaint and know the contents thereof and the matters therein alleged are true.

P. V. Adkins.

Subscribed and sworn to before the undersigned this May 17, 1946.

M. M. Ewing,
Deputy Clerk U. S. District Court
Northern District of Oklahoma.

(Seal)

Porter & Porter, Attys. for Plaintiffs,
By John W. Porter, Jr.,
630 Equity Building,
Muskogee, Oklahoma.

Filed: May 17, 1946, H. P. Warfield, Clerk U. S. District Court.

In the United States District Court in and for the Northern District of the State of Oklahoma.

No. 1816-Civil.

P. V. Adkins, *et al.*, Plaintiffs, *vs.* E. I. du Pont de Nemours & Co., Inc., Defendant.

AMENDMENT TO COMPLAINT.

Comes now P. V. Adkins for himself and as agent for all the other claimant parties plaintiff herein, and for amendment to and in addition to the complaint originally filed herein, allege and state:

1. That before going through the clock gates of defendant's plant and place of business near Pryor, Oklahoma, before the work shifts, all claimants herein were, under defendant's rules and regulations and supervision and as a condition and part of their respective employments with the defendant, required by defendant to travel over approximately three (3) miles of private roadway and either park their cars in parking lots adjacent to and walk to the clock gates or get out of buses or cars of others in which they rode at places adjacent to and walk to the clock gates, all of which took place on land under the control and supervision of defendant at all times involved in this action, all of which acts were necessary to and a part of said employments and which consumed or required at least twenty (20) minutes per claimant per workday worked at the plant in addition to the time claimed in the complaint originally filed herein.

2. That after going back out through the clock gates after the work shifts, all claimants herein were, under the defendant's rules and regulations and supervision and as a condition and part of their respective employments with the defendant, required by defendant to either walk back to and wait at their parked cars or the parked cars of others in the parking lots or wait on and board buses at places adjacent to the clock gates, and thereafter travel back over said roadway, all of which were necessary to and a part of

said employments and which consumed or required at least forty (40) minutes per claimant per workday worked at the place in addition to the time claimed in the complaint originally filed herein.

3. That these claimants were not paid for any of this time even though it is time worked as contemplated by the Act and Executive Order under which this action is brought, and was therefore compensatable at one and a half times their respective regular hourly rates of pay for the first six (6) workdays worked each workweek and at two times their respective regular hourly rates of pay for the seventh (7th) workday worked each workweek.

Wherefore, premises considered, in addition to the amounts previously prayed for, plaintiffs pray judgment against the defendant for this additional time of sixty (60) minutes per claimant per workday worked at three (3) times their respective regular hourly rates of pay for six (6) days per workweek, and at two (2) times their respective regular hourly rates of pay for the seventh (7th) consecutive workday worked each workweek, all for the duration of their respective employment with the defendant as set out in the complaint originally filed herein.

P. V. Adkins, as Agent,
Plaintiffs,
Porter and Porter,
Attys. for Plaintiffs,
By John W. Porter, Jr.,
630 Equity Building,
Muskogee, Okla.

State of Oklahoma, Muskogee County—ss.:

P. V. Adkins, of lawful age being first duly sworn upon oath, states: I am the person named in the caption of the above and foregoing Amendment to Complaint as agent for all parties plaintiff therein, and I have read said instrument and know the contents thereof and the matters therein alleged are true.

P. V. Adkins.

Subscribed and sworn to before the undersigned this June 24, 1946. E. R. Bryant, Notary Public. (Seal) My commission expires 11-12-49.

I, John W. Porter, Jr., of Porter & Porter, Attorneys for plaintiffs herein, hereby certify that I mailed a true and correct copy of the above and foregoing instrument to the defendant's attorneys, Spillers & Spillers, 711 Ritz Building, Tulsa, Oklahoma, on June 24th, 1946.

John W. Porter, Jr.,

Filed Jun. 25, 1946. H. P. Warfield, Clerk U. S. District Court.

In the District Court of the United States for the Northern Distr of Oklahoma.

No. 1816-Civil.

P. V. Adkins, *et al.*, Plaintiffs, *vs.* E. I. du Pont de Nemours & Company, Inc., Defendant.

ANSWER TO COMPLAINT AND AMENDMENT TO COMPLAINT.

Comes now the defendant and for its answer to the complaint, and amendment to complaint, filed herein, alleges and states:

First Defense.

The complaint and amendment to complaint herein fail to state claims against defendant upon which relief may be granted to the plaintiffs, or any of them.

Second Defense.

The defendant denies each and every material allegation in the complaint and amendment to complaint, filed herein, except such as are hereinafter specifically admitted.

Defendant admits that it is now and was at all times hereinafter mentioned a corporation, organized and existing under and by virtue of the laws of the State of Dela-

ware, with its principal place of business in the City of Wilmington, Delaware, and that it was at all times mentioned in the complaint and amendment to complaint duly authorized to transact business in the State of Oklahoma.

Defendant further admits that during the period from on or about July, 1942, up to and including V-J Day, on or about August 11, 1945, it operated for the United States Government what is commonly known as the Oklahoma Ordnance Works, located in Mayes County, Oklahoma.

Defendant further admits that it kept accurate records showing the time worked by each employee of the Oklahoma Ordnance Works and the amount of compensation paid to such employee.

It likewise admits that at the anti-sabotage barrier, constructed about the said plant in pursuance of the direction of the United States Government, it had clocks for keeping a record for clocking in and clocking-out time for persons employed in the said plant.

Third Defense.

Defendant for its third defense states that the statute of limitations on the claim of the plaintiffs, and each of them, is a three-year statute under the laws of the State of Oklahoma, and it pleads the same in bar of any claim of the plaintiffs, or any of them, which accrued prior to three years prior to the date of filing the complaint.

Fourth Defense.

Defendant for its further defense states that it made and entered into a certain written contract and agreement with the United States Government, under and by virtue of the terms of which it did undertake to and did operate what is commonly known as the Oklahoma Ordnance Works in Mayes County, Oklahoma, for the United States Government and for the purpose of manufacturing military explosives for the United States Government, to be used and which were used in the successful prosecution of what is commonly known as World War II.

Fifth Defense.

Defendant for its further defense specifically denies that the plaintiffs, or any of them, in connection with work about the Oklahoma Ordnance Works, as alleged in their complaint and amendment to complaint, were engaged in commerce or in the production of goods for commerce or for inter-state commerce, as defined in the Fair Labor Standards Act, and none of the plaintiffs herein comes within the Fair Labor Standards Act.

Sixth Defense.

Defendant further states that the said plant was operated exclusively for war purposes. That all shipments made of military explosives manufactured in the said plant were made by the United States Government in cars furnished by it or caused to be furnished, directed to designations unknown to the defendant. Presumably, all of the said materials were shipped to points designated by the United States Government and used in and about winning what is commonly known as World War II.

Defendant further states that the Government of the United States in the shipment of materials to or causing the same to be shipped to what is commonly known as the Oklahoma Ordnance Works in Mayes County, Oklahoma, and the shipment of materials and products therefrom, was acting in its governmental capacity in the defense of its very existence as a nation, and not engaged in commerce or the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 in any sense whatsoever.

Seventh Defense.

Defendant further states that the United States Government is now and was at all times mentioned in the complaint and amendment to complaint, filed herein, the owner of what is known as the Oklahoma Ordnance Works in Mayes County, Oklahoma, including all real estate, together with all improvements thereon and appurtenances there-

unto belonging, and all personal property, including all materials for the manufacture of military explosives at the time of acquisition of such materials and during all states of manufacture up to and including the finished product, and that the defendant operated the said plant where plaintiffs were employed, for and on behalf of the United States Government and under its immediate direction and control, pursuant to a cost-plus fixed fee contract with the United States Government, a copy of which is hereto attached, marked "~~Exhibit~~ A" and made a part hereof.

Eighth Defense.

Defendant admits that it required all employees who worked at the Oklahoma Ordnance Works to clock in and clock out. That the clocking-in and clocking-out time and travel time to and from the anti-sabotage barrier, placed about said plant in pursuance of the direction of the United States Government, and the points of work, constituted no part of the time in which the plaintiffs were engaged in any productive work. Defendant specifically denies that it is indebted to the plaintiffs, or any of them, in any manner whatsoever for any work, labor and services, whether productive or non-productive, performed in connection with the operation of the Oklahoma Ordnance Works; but if it be held, contrary to the contention of defendant, and that it is indebted to any of the plaintiffs in this cause, the defendant insists that the plaintiffs, and each of them, be required to submit specific and definite proof of the actual necessary time consumed by each claimant in traveling from the said anti-sabotage barrier by the usual mode of travel to his or her particular point of productive work, and by the usual mode of travel returning to the said anti-sabotage barrier from the point of productive work of each claimant.

Ninth Defense.

Defendant for its further defense specifically denies that it is indebted to the plaintiffs, or any of them, in any sum whatsoever, and specifically denies the correctness of the claims sued on by the plaintiffs, and each and all of them.

Tenth Defense.

Defendant denies that plaintiffs have a right to prosecute this action on behalf of themselves and others similarly situated, but, on the contrary, alleges that each claimant's claim is in effect a separate and distinct lawsuit and demands strict proof of all essential elements to make out a case on behalf of any of the plaintiffs herein.

Eleventh Defense.

Defendant for further defense states that in connection with the allegations concerning change in wearing apparel in the plant, that some of the plaintiffs were required to make changes of wearing apparel after entering the anti-sabotage barrier into the Government military reservation on which the Oklahoma Ordnance Works was located, but that the time required to make changes of wearing apparel was insignificant, only requiring about two or three minutes, except in the case of those who were required to take a bath before leaving the plant and for all such employees, they were fully compensated for the time required to bathe and change their clothes.

Defendant further states that for all work, labor and services rendered by any of the plaintiffs herein, defendant paid for all such work out of funds furnished by the United States Government for such purposes.

Twelfth Defense.

Defendant for its further defense states that during the progress of the work at the Oklahoma Ordnance Works in Mayes County, Oklahoma, what is known as Executive Order No. 9240 was issued by Honorable FRANKLIN D. ROOSEVELT, President of the United States, on or about September 9, 1942. That the defendant herein complied with all the terms and conditions of the said Executive Order insofar as it pertained to the operation of the production of materials for war purposes at the Oklahoma Ordnance Works and paid to the plaintiffs any and all moneys which became due and payable under the terms of the said Execu-

tive Order No. 9240, out of funds furnished by the United States of America for such purposes.

Defendant demands the right to trial by jury of all issues of fact involved in this cause.

Wherefore, having answered the complaint and amendment to complaint fully, defendant prays that the complaint and amendment thereto of the plaintiffs be denied and dismissed, at the cost of the plaintiffs, and that it be allowed to go hence and recover its costs herein expended.

Peter B. Collins,
Wilmington, Delaware,
Spillers & Spillers,
By G. C. Spillers,
711 Ritz Building,
Tulsa, Oklahoma,
Attorneys for Defendant.

Proof of Service.

I, G. C. Spillers, hereby certify that I mailed a true and correct copy of the foregoing answer to Porter & Porter, 630 Equity Building, Muskogee, Oklahoma, attorneys for plaintiffs, on the 29th day of July, 1946.

G. C. Spillers,

(Exhibit A—Contract W-ORD-521 DA-W-ORD-8) attached to this pleading but omitted herefrom.)

Filed: July 29, 1946, H. P. Warfield, Clerk U. S. District Court.

In the United States District Court in and for the Northern District of Oklahoma.

No. 1816-Civil.

P. V. Adkins, as Agent for J. R. Adcock, *et al.*, Plaintiffs *vs.* E. I. du Pont de Nemours & Company, Inc., Defendant.

AMENDMENT TO ANSWER.

Comes now the defendant, and by leave of court first

had and obtained, files this its amendment to the answer herein and for its Twelfth Defense alleges and states:

Defendant for its further defense states that during the progress of the work of the Oklahoma Ordnance Works in Mayes County, Oklahoma, what is known as Executive Order No. 9240 was issued by Honorable FRANKLIN D. ROOSEVELT, President of the United States, on or about September 9, 1942. Defendant states that it complied with all the terms and conditions of the said Executive Order in so far as it pertained to the production of war materials at said Oklahoma Ordnance Works for the use of the United States Government in the promotion of World War II.

Defendant further alleges that the said Executive Order No. 9240 did not have the force and effect at law, nor did it confer upon the plaintiffs, or any of them, any right of action of whatsoever nature or kind, and plaintiffs herein cannot maintain any action or claim herein based upon said Executive Order No. 9240.

Wherefore, having answered the complaint and amendment thereto fully, defendant prays that the said complaint and amendment thereto be denied and dismissed at the cost of the plaintiffs, and that it be allowed to go hence and recover its costs herein expended.

Peter B. Collins,
Wilmington, Delaware,
Spillers & Spillers,
By G. C. Spillers,
711 Ritz Building,
Tulsa, Oklahoma.

I, G. C. Spillers, hereby certify that on the 2nd day of January, 1947, I mailed a true and correct copy of the above and foregoing amendment to answer to the attorneys of record for the plaintiffs in the above entitled cause, to-wit: Porter & Porter, Attorneys at Law, 630 Equity Building, Muskogee, Oklahoma.

G. C. Spillers.
G. C. Spillers.

Leave given to file this 2nd day of January, 1947.

Royce H. Savage, Judge.

Filed Jan. 2, 1947, Noble C. Hood, Clerk U. S. District Court.

In the United States District Court in and for the Northern District of the State of Oklahoma.

No. 1816-Civil.

Grace W. Adkins as Administratrix of the Estate of P. V. Adkins, Deceased, Plaintiff, *vs.* E. I. du Pont de Nemours & Company, Inc., Defendant.

MOTION.

Comes now the plaintiff and moves the Court to judicially find and determine herein that what is known as the "Portal-to-Portal Act of 1947," otherwise known as "An Act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes" (Bill H. R. 2157) as passed by the Congress of the United States of America on May 1, 1947, and as signed by the President of the United States on May 14, 1947, does not apply to the case at bar, and that if the same does apply or tend to apply to the case at bar in any respect then said Act (1947) violates the Constitution of the United States of America, is unconstitutional, particularly as to its (Bill H. R. 2157) Section 1. (findings and policy), 2. (existing claims), 9. reliance on past administrative rulings, etc.), and 11. (liquidated damages), for the following reasons which would materially affect the substantial rights of plaintiff claimants:

1. Said Section 1 is too indefinite and vague to ascertain the intent and policy of Congress in said Act, and for all practical purposes is composed of groundless statements, and seeks to judicially determine the existence of

arious liabilities which have not been judicially determined y the courts and which Congress has no such power. Congress has the legislative power to determine the probable xistance and amounts of claims of a given class, but does ot have power to judicially determine what portion or mount of such claims constitute liability.

2. Said Section 2 seeks to deprive plaintiff claimants f their liberties, freedomes, properties and vested rights, ithout due process of law and without any compensation, nd, read in the light of the rest of said Act; seeks to judiially determine that traveling and various other activities ecessarily required of employees in their employment hether supervised by the employer and/or on the employr's property do not constitute work. What is work, is a uestion for judicial determination to be made only by the ourts. And work is property that cannot be taken without lue process of law and without just compensation according to the Constitution.

3. Said Section 9 seeks to deprive plaintiff claimants f their liberties, freedoms, properties and vested rights, ithout due process of law and without any compensation, y seeking to divest the courts of their judicial powers and est such powers in the administrative or executive branch f our Federal Government contrary to the Constitution.

4. Said Section 11 seeks to jeopardize said liberties, reedoms, properties and vested rights and constitutional ights of plaintiff claimants, by extracting the teeth and he most effective enforcement and remedial portions of the ery law (Fair Labor Standards Act of 1938) that serves o protect and preserve said liberties, freedoms, properties nd rights.

5. Article III of the Constitution provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *"

Congress has no judicial power, yet by and through the Act

complained of it seeks to convince the people that various and sundry and vaguely described yet catastrophical and awful conditions will come to pass *but* said act, all based on its purposed determination of the existence of various and sundry and vaguely described yet immense liabilities from someone to someone. The December 2, 1946, issue of Newsweek magazine carried a statement on page 77 thereof as follows:

> "*Walking Time.* The United Mine Workers' District 50 has already won settlements of $9,000,000, with many cases still pending. It has collected $4,656,000 from the Dow Chemical Co. in a voluntary settlement, and is suing du Pont for $1,000,000 * * *."

We fail to find where any such industries are going broke or their stock is losing value because of such settlements or payments. The August 12, 1946, issue of Newsweek magazine carried a statement on pages 28 and 29 thereof as follows:

> "Squandered Billions. * * * For three hours last week Washington's *earns* burned to a crisp. On the witness stand of the Senate War Investigating Committee was one of the Capitol's most outspoken men—Comptroller General Lindsay C. Warren, so-called 'watchdog of the Treasury.' Angrily he barked out his charge; in five years the Federal Government—specifically the War Department—had thrown away 'untold billions' on war contracts. * * * Even with its hands tied by wartime procedures, Warren explained, the GAO (General Accounting Office) had recovered more than $100,000,000 in 'illegal payments' during the past year. But as for $65,000,000,000 worth of already settled war contracts, 'the door is closed forever on any recovery of overpayments by the government'."

We have also noticed that the United States recently canceled the British War Debt to our Government totaling some $34,000,000,000, and in addition loaned the British $4,000,000,000, and further that our Government recently has or soon will loan or "give" billions of dollars more to

Greece, Turkey, France, China, and others to right communism abroad. Such facts and figures as these do not indicate that our Public Treasury or our industry employers are going broke as Congress would have us believe said Act. Said Act is in fact opposed to justice and is itself the total absence of justice, thus constituting the most ideal food and shelter for communism right here at home.

6. Amendment I of the Constitution provides:

"Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble * * *."

Plaintiff's Exhibits No. 21, No. 22, No. 23, and No. 24 (handbooks) introduced in evidence at the trial, contain such rules of the defendant as that numbered 17 on page 66 of said Exhibit No. 23, reading as follows:

"17. *Miscellaneous Rules.* No solicitations of any kind whatsoever will be allowed within the Works. No printed material of any kind may be posted on bulletin boards within the Works, except that pertaining to Federal, State, or Company matters."

Such rules are not confined to paid time or to places within the anti-sabotage fence on the Works, but apply and extend to all times and places on said Works, including times and places outside said fence on "C Street" and the parking area and loading and unloading zones, etc., on said works, all within the jurisdiction of the defendant. Said Act in this instance tends to violate the Amendment by unjustly upholding the abridging of such freedoms of plaintiff claimants.

7. Amendment IV of the Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. * * *"

Plaintiff's said exhibits above mentioned contain such rules of the defendant as that numbered 10 on page 65 of said Exhibit No. 23, reading as follows:

"10. *Search.* All employees may be searched when entering the Works and, from time to time, may be searched within or upon leaving the Works. These searches are conducted for the protection of the employees as well as for the protection of the Works."

Such rules are not confined to paid time or to places within the anti-sabotage fence on the Works, but apply and extend to all times and places on said Works, including times and places outside said fence on "C Street" and the parking areas and loading and unloading zones, etc., on said Works, all within the jurisdiction of the defendant. Said Act in this instance tends to violate the Amendment by unjustly upholding defendant's violation of such rights of plaintiff claimants.

8. Amendment V of the Constitution provides:

"No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Considering the facts in the case at bar that plaintiff claimants were by the defendant necessarily required to regularly and daily devote substantial portions of their time and effort on defendant's property for the benefit of defendant in traveling certain routes as prescribed by defendant in certain ways and manners as prescribed by defendant and in performing various other particular activities ordered and as prescribed by defendant, for which no compensation was paid; said Act in this instance tends to violate the Amendment by unjustly upholding defendant's acts or depriving plaintiff claimants of their liberty and property without any compensation and without due process of law.

9. Amendment IX of the Constitution provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.", and

Amendment X of the Constitution provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In this instance said Act tends to deny or disparage the rights and powers retained and reserved by and to the plaintiff claimants, as defendant has denied and disparaged their rights and powers as proved in the trial of the case at bar.

10. Amendment XIII of the Constitution provides:

"Neither slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction * * *"

Considering the facts in the case at bar that plaintiff claimants were by the defendant necessarily required to regularly and daily devote substantial portions of their time and effort on defendant's property for the benefit of defendant in traveling certain routes as prescribed by defendant in certain ways and manners as prescribed by defendant and in performing various other particular activities ordered and as prescribed by defendant, for which no compensation was paid; said Act in this instance tends to violate the Amendment by unjustly upholding and sanctioning the involuntary servitude of plaintiff claimants for the sole benefit of defendant for practically all the time sued for.

11. Amendment XIV of the Constitution provides:

"* * * The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned * * *"

The Act complained of is based and purposed primarily on the questioning of the validity of the public debt of the United States, and since such basis is unconstitutional the Act in its entirety is unconstitutional as being arbitrary and void of just purpose.

12. Amendment XIV of the Constitution provides:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *", and

Section 10 of Article I of the Constitution provides:

"No state shall * * * pass any Bill of Attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. * * *"

This amendment and this section of this article are each premised on the fundamental facts that the people to have privileges, immunities, life, liberty, property, the rights to the equal protection of the laws, and obligations of contracts, all of which are reserved to the people and protected by the Constitution. In this instance said Act tends to deprive the liberty and property of plaintiff claimants and impair the defendant's obligation of contract to them, all without any compensation therefor and without due process of law as to all time necessarily spent on the Works of defendant by plaintiff claimants before and after their regular shift times. The Act tends to deprive the plaintiff claimants of their constitutional rights to the equal protection of the laws in that it seeks to unjustly penalize them and benefit the defendant in money, based on the fact that the three laws named in said Act were violated by the defendant and no adjudication or recovery has been had thereon at the date of said Act, while other and similar industries to the defendant paid their similarly situated employees for similar time and activities covering the same period of operations pursuant to said laws either voluntarily or pursuant to court action, concerning which said Act makes no pretense to declare an equalizing or reverse cause of action running against such paid employees in favor of their employers. In this respect said Act tends to sanction and protect only such employees who insisted on and collected by court action or otherwise during the recent war emergency

the pay for such time as is involved in the case at bar, while at the same time it tends to condemn and punish without just cause those employees who were not so paid and who did not bring court action therefor during the war emergency, many of which unpaid employees were for a year or more actually serving in the armed forces of our Government in that war and many of which will never return. Such unpaid employees, as soldiers fought and gave their blood to preserve and insure the rights and privileges and freedoms and obligations which said Act seeks now to destroy.

For reference and authority, see:

Lynch v. *United States*, 78 L. ed. 1434;
Alonzo Bailey v. *State of Alabama*, 55 L. ed. 191;
United States v. *Petrillo*, 68 F. Supp. 845;
Chastleton Corp. v. *Sinclair*, 68 L. ed. 841;
Reid v. *Solar Corp.*, 69 F. Supp. 626.

Respectfully,

Porter & Porter,
Attys. for Plaintiff.
By John W. Porter, Jr.

I, John W. Porter, Jr., hereby certify that on this May 22, 1947, I personally delivered a true copy of the above and foregoing Motion to the defendant's counsel by delivery of such copy to Mr. G. C. Spillers of Spillers, Spillers & Voorhees, attorneys for the defendant, in open court.

John W. Porter, Jr.

Filed in open Court May 22, 1947, Noble C. Hood, Clerk U. S. District Court.

In the United States District Court in and for the Northern District of Oklahoma.

No. 1816-Civil.

Grace W. Adkins, as administratrix of the estate of P. V. Adkins, deceased, as agent for J. R. Adcock, *et al.*,

Plaintiffs, *vs.* E. I. du Pont de Nemours & Company, Inc., Defendant.

AMENDMENT TO AMENDED ANSWER.

Comes now the defendant, and by leave of court first had and obtained, files this its amendment to its amended answer filed herein, and for further defense states:

That on the 14th day of May, 1947, what is known as the Portal-to-Portal Act of 1947 was signed by the President of the United States and became effective, and that under and by virtue of the said Act the plaintiffs herein cannot maintain this action. That none of the claims alleged and set forth in the complaint herein are compensable within the meaning and terms of the said Portal-to-Portal Act of 1947, and defendant herein pleads the said Act and all applicable terms thereof as a bar to any right of recovery on behalf of the plaintiffs, or any of them.

Wherefore, it prays that in addition to all of the defenses heretofore set up in its answer herein and amendment thereto be considered and that the claims of the plaintiffs, and each of them, be denied and dismissed at their cost.

Peter B. Collins,
Wilmington, Delaware,
Spillers, Spillers & Voorhees,
By G. C. Spillers,
711 Ritz Building,
Tulsa, Oklahoma,
Attorneys for Defendant.

Service of copy of the above Amendment to Amended Answer is hereby acknowledged this 22nd day of May, 1947.

Porter & Porter,
By John W. Porter, Jr.,
Attorneys for Plaintiffs.

Filed May 22, 1947. Noble C. Hood, Clerk U. S. District Court.

In the District Court of the United States for the Northern District of Oklahoma.

No. 1816, Civil.

Grace W. Adkins, as Administratrix of the Estate of P. V. Adkins, deceased, *et al.*, Plaintiffs, *vs.* E. I. du Pont de Nemours & Company, Inc., Defendants; United States of America, Intervenor.

PLEADING OF THE UNITED STATES IN INTERVENTION.

The United States of America, intervenor herein, for its pleading in intervention, says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, and if it sustains the factual findings of the Special Master herein, it should dismiss the action under the *de minimis* doctrine announced by the Supreme Court of the United States in the case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, without ruling on the constitutional question.

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

Tom C. Clark, Attorney General,
By Herbert A. Bergson,
Herbert A. Bergson,
Acting Assistant Attorney General,

Whit Y. Mauzy,
Whit Y. Mauzy,
United States Attorney.

Of Counsel:
Enoch E. Ellison,
Special Assistant to the Attorney General,
Charles S. Corben,
Attorney, Department of Justice.

I hereby certify that copies of the foregoing Pleading of the United States in Intervention were mailed to the following, this 14th day of July, 1947: Spillers, Spillers & Voorhees, 711 Ritz Building, Tulsa, Oklahoma; Porter & Porter, Muskogee, Oklahoma.

Whit Y. Mauzy,
Whit Y. Mauzy,
United States Attorney.

Filed in open Court, Jul. 15, 1947, Noble C. Hood, Clerk U. S. District Court.

In the United States District Court for the Northern District of Oklahoma

No. 1816, Civil.

Grace W. Adkins, administratrix of the Estate of P. V. Adkins, deceased, *et al.*, Plaintiffs, *vs.* E. I. du Pont de Nemours & Company, Inc., Defendant; United States of America, Intervener.

ORDER OF DISMISSAL.

This cause coming on for hearing before me, Royce H. Savage, Judge of the said Court, on this the 24th day of September, 1947, for hearing on objections to Master's Report and application to modify and confirm report, and on objections to the constitutionality of the Act of Congress known as the Portal-to-Portal Act of 1947, and the plaintiffs appearing by their attorneys, Porter & Porter, by John W. Porter, Jr., and by Fred W. Martin, and the de-

fendant appearing by its attorneys, Peter B. Collins of Wilmington, Delaware, and Spillers, Spillers & Voorhees of Tulsa, Oklahoma, and the United States appearing by Whit Y. Mauzy, United States District Attorney; and the Court having heard the argument of counsel and being advised in the premises finds that the Act of Congress known as the Portal-to-Portal Act of 1947 is constitutional, and that this Court under and by virtue of the terms of the said Act has no jurisdiction to pass upon further matters involved in controversy in this cause, and that this cause should be dismissed for want of jurisdiction, to which the plaintiffs object and except.

It is therefore considered, ordered, adjudged and decreed by the Court that this cause be and the same is hereby dismissed at the cost of the plaintiffs, to which the plaintiffs except.

Dated this 24th day of September, 1947.

Royce H. Savage, Judge.

Approved as to form: Grace W. Adkins, as administratrix of the Estate of P. V. Adkins, deceased, et al., Plaintiffs, By Porter & Porter, By John W. Porter, Jr., Their Attorneys. E. I. Du Pont de Nemours & Company, Inc., Defendant, By Peter B. Collins, Wilmington, Delaware, Spillers & Spillers & Voorhees, By G. C. Spillers, Its Attorneys. United States, By Whit Y. Mauzy, United States District Attorney, Its Attorney.

Filed Sep. 26, 1947, Noble C. Hood, Clerk U. S. District Court.

In the District Court of the United States for the Northern District of Oklahoma.

No. 1816-Civil.

Grace W. Adkins, as Administratrix of the Estate of P. V. Adkins, Deceased, *et al.*, Plaintiffs, *vs.* E. I. du Pont de

Nemours & Company, Inc., Defendant; United States of America, Intervener.

DESIGNATION OF PORTIONS OF RECORD FOR USE IN RESPONSE TO PETITION FOR CERTIORARI.

To Honorable Noble C. Hood,

Clerk of the United States District Court
for the Northern District of Oklahoma:

Please furnish us at your earliest convenience copies of the following:

1. The petition and all interventions filed by the plaintiffs and interveners herein.

2. The answer of the defendant and amendments thereto setting up and pleading the Portal-to-Portal Act of 1947.

3. The motion of the defendant to dismiss on the ground that the Portal-to-Portal Act of 1947 ousts the trial court of jurisdiction to proceed further except to dismiss.

4. Response of plaintiffs and interveners to motion to dismiss under the Portal-to-Portal Act.

5. Order of dismissal.

6. This designation of a portion of the record.

7. A certificate certifying that all of the instruments above referred to and designated are true and correct copies of the originals on file in your office.

Peter Be. Collins,
Wilmington, Delaware,
Spillers & Spillers,
Tulsa, Oklahoma,
By G. C. Spillers,
G. C. Spillers,
Attorneys for Defendant.

I, G. C. Spillers, hereby certify that on the ... day of September, 1948, I mailed a true and correct copy of the above and foregoing Designation of Portions of Record for

use in response to petition for certiorari to the attorneys of record for the plaintiffs and interveners, to-wit: Porter & Porter, Attorneys at Law, 630 Equity Building, Muskogee, Oklahoma, and to Honorable Whit Y. Mauzy, United States District Attorney for the Northern District of Oklahoma, Attorney for the Intervener, The United States of America, with postage fully prepaid.

G. C. Spillers
G. C. Spillers

Filed: Sep. 17, 1948, Noble C. Hood, Clerk U. S. District Court.

Certified Copy D. C. Form No. 30

United States of America, Northern District of Oklahoma—ss:

I, Noble C. Hood, Clerk of the United States District Court in and for the Northern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and full copy of the original complaint, amendment to complaint, answer to complaint and amendment to complaint, amendment to answer, motion of plaintiff for determination of Portal-to-Portal Act of 1947, amendment to amended answer, pleading of the United States in intervention, order of dismissal and designation of portions of record for use in response to petition for certiorari, in Civil Action No. 1816, Grace W. Adkins, as Administratrix of the Estate of P. V. Adkins, Deceased, *et al.*, Plaintiffs, *vs.* E. I. du Pont de Nemours & Company, Inc., Defendant and The United States of America, Intervener, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Tulsa, Oklahoma, this 21 day of September, A. D. 1948. Noble C. Hood, Clerk. (Seal) By Angie Comstock, Deputy Clerk.

In the United States District Court in and for the Northern District of the State of Oklahoma.

No. 1816, Civil.

Grace W. Adkins as administratrix of the Estate of P. V. Adkins, deceased, Plaintiff, *vs.* E. I. du Pont de Nemours & Co., Inc., Defendant; The United States of America, Intervenor.

DESIGNATION OF RECORD ON APPEAL AND MOTION THEREON.

Comes now the plaintiff, Grace W. Adkins as administratrix of the Estate of P. V. Adkins, deceased, and designates and requests that the complete record and all proceedings and evidence herein made and had both in this Court and before the Special Master in this action, including all briefs and arguments of all counsel presented herein, be included and contained in the record on appeal herein to the United States Circuit Court of Appeals for The Tenth Circuit; and plaintiff moves this Court for appropriate orders granting and facilitating her appeal herein *in forma pauperis* and for such other relief in her appeal as may be proper and for reason, states:

1. Plaintiff desires to appeal this case to the United States Circuit Court of Appeals for The Tenth Circuit and believes she is entitled to the redress she seeks, and has accordingly given and filed her Notice of Appeal herein. The action plaintiff maintaines herein is meritorious as more particularly reflected by all the record so designated, and she is a citizen of the United States of America and is such a person as contemplated by Title 28, United States Code Annotated, Sec. 832.

2. In order to properly review this case on appeal, with due regard to the respective contentions of all parties as to the wage-hour claims involved and as to the constitutionality challenge of the Portal-to-Portal Act of 1947, it will be necessary to examine and consider all that plaintiff has designated and to have a full hearing thereon.

3. Due to the voluminous nature of the record so designated and to the financial condition of plaintiff, she is unable to pay or secure the costs of preparing the record in this appeal. The verbal testimony taken before the Special Master in the trial would total an estimated 1650 typewritten pages at 250 words per page, and the exhibits alone would consume several average book volumes, and the pleadings and papers on file have accumulated at a fast rate from May 17, 1946, to date. Plaintiff is 74 years of age and is the sole beneficiary of the Estate of P. V. Adkins, deceased, being the surviving widow of said deceased. Plaintiff's only source of income and means of support is the renting out of portions of her home which constitutes said Estate appraised at $3450, said home being located at 820 Callahan Street in the City of Muskogee, Oklahoma. All of plaintiff's income is used and required in providing her the necessities of life.

Grace W. Adkins,
Administratrix of the Estate of
P. V. Adkins, deceased, Plaintiff.

Porter & Porter,
Attys. for Plaintiff,
By John W. Porter, Jr.

State of Oklahoma, County of Muskogee—ss:

Grace W. Adkins as administratrix of the Estate of P. V. Adkins, deceased, being first duly sworn on oath, states: I am the plaintiff in the above entitled and captioned action, and I have read the above Designation of Record on Appeal and Motion Thereon and know the contents thereof and the matters and things therein set out are true and correct.

Grace W. Adkins,
Administratrix of the Estate
of P. V. Adkins, deceased.

Subscribed and sworn to before me this October 28, 1947. (Seal) Juanita Merritt, Notary Public. My notary commission expires Nov. 12, 1950.

I, John W. Porter, Jr., of Porter & Porter, Attys. for Plaintiff, hereby certify that on October 28, 1947, I mailed a true copy of the above and foregoing Designation of Record on Appeal and Motion Thereon to defendant's counsel, Peter B. Collins and Spillers, Spillers & Voorhees, Attys. at 711 Ritz Bldg., in Tulsa, Oklahoma, and also the intervenor's counsel, Attorney General Tom Clark and Whit Y. Mauzy, United States Attorney at 335 Postoffice Bldg., in Tulsa, Oklahoma.

John W. Porter, Jr.

Filed Oct. 29, 1947, Noble C. Hood, Clerk U. S. District Court.

Certified copy D. C. Form No. 30

United States of America, Northern District of Oklahoma—ss:

I, Noble C. Hood, Clerk of the United States District Court in and for the Northern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and full copy of the original Designation of Record on Appeal and Motion Thereon in Civil Action No. 1816, Grace W. Adkins as administratrix of the Estate of P. V. Adkins, deceased, Plaintiff, vs. E. I. du Pont de Nemours & Co., Inc., Defendant, and The United States of America, Intervenor, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Tulsa, Oklahoma, this 17th day of September, A. D. 1948.

Noble C. Hood, Clerk,

(Seal) By Angie Comstock, Deputy Clerk.

In the United States District Court for the Northern District of Oklahoma.

No. Civil 1816.

P. V. Adkins, as Agent for J. R. Adcock, W. C. Brewster,

V. J. Blevins, T. F. Holmes, W. A. Heape, J. A. Hodges, R. Kanard, R. E. Ladd, C. Rogers, Jr., W. M. Reinner, V. R. Willis, and C. Snodgrass, Plaintiffs, *vs.* E. I. DuPont de Nemours & Co., Inc., Defendant.

ORDER.

This matter coming on for hearing on this 22nd day of May, 1947, for fixing the compensation of the Special Master, Bradford J. Williams, and the plaintiffs appearing by their attorneys of record, and the defendant appearing by its attorneys of record, and the Special Master appearing in person, and the Court having heard testimony as to the services rendered by the Special Master and testimony as to the fair and reasonable compensation for said services finds that $6,000.00 is a fair and reasonable compensation for the services rendered by the Special Master, and further finds that under the particular circumstances involved in the appointment of the Special Master that the compensation of the Special Master should be paid by the defendant.

Now, therefore, it is ordered, adjudged and decreed: (1) The compensation allowed to Bradford J. Williams as Special Master is fixed at $6,000.00; (2) The compensation of the Special Master is charged upon the defendant, E. I. DuPont de Nemours & Co., Inc., and said defendant is ordered to pay said compensation within thirty (30) days from this date.

To which orders the defendant objects and excepts.

/s/ Royce H. Savage,
U. S. District Judge.

Filed May 26, 1947, Noble C. Hood, Clerk U. S. District Court.

Certified copy D. C. Form No. 30

United States of America, Northern District of Oklahoma—ss:

I, Noble C. Hood, Clerk of the United States District Court in and for the Northern District of Oklahoma, do

hereby certify that the annexed and foregoing is a true and full copy of the original Order filed May 26th, 1947, in No. 1816-Civil, P. V. Adkins, as Agent for J. R. Adcock, et al, vs. E. I. DuPont de Nemours & Co., Inc., now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Tulsa, Oklahoma, this 23rd day of September, A. D. 1948.

Noble C. Hood, Clerk,
(Seal) By Benjamin B. Ballenger,
Deputy Clerk.

June 18, 1948.

Porter & Porter, Attorneys at Law,
630 Equity Building, Muskogee, Oklahoma:

Attention John W. Porter, Jr.

Gentlemen: In re Adkins, etc., v. Du Pont.

Since the Supreme Court of the United States on your application for instructions has requested that we argue this cause orally on October 18th next, it will be necessary that you furnish us a copy of your contract so that we may refer to it in our brief and argument. Please let us have a copy of your contract at your earliest convenience. It is not necessary to furnish us all the contract, simply a contract that shows the general form and the general plan of your employment.

With kind regards, we are

Yours truly,

Spillers & Spillers,
GCS:dj By G. C. Spillers.

Porter & Porter, Attorneys,
630 Equity Building, Muskogee, Okla.

June 21, 1948.

Messrs. Spillers & Spillers, Attys.,
711 Ritz Bldg., Tulsa, Oklahoma.

Gentlemen: Re: Adkins, etc., vs. Du Pont, U. S. Supreme Court, No. 345—Miscellaneous, Argument 10-18-1948.

We have your letter of June 18, 1948, wherein you request a copy of the general form of what you refer to as our employment contract in this matter in view of the Court's order of June 1st.

We are prepared to comply with the Court's said order but we do not see where your request concerns such, and we are opposed to doing anything at this time that may lead to further enlargement and complication of an already large and complicated record. As you know, all parties are bound by the record already before the Courts, and while you made no effort to get any such information in the lengthy trial before the Special Master you did try to show the fee arrangement between the 12 claimants and their agent Adkins to which we objected and our objections were sustained by the Special Master, and your objections to the Special Master's findings of fact and conclusions of law do not controvert this point, and you have taken no appeal. For the reasons we have stated, we feel compelled to decline your request. We feel sure you would do the same if you were on our side.

Yours very truly,

Porter & Porter, Attys.,
John W. Porter, Jr.

PP:jp

Augnst 9, 1948.

Porter & Porter, Attorneys at Law,
630 Equity Bldg., Muskogee, Oklahoma.

Gentlemen: In re Du Pont cases.

In view of the nature of the argument to be made before the Supreme Court of the United States in October next, please be so kind as to furnish us with a copy of the form of contingent contract.

We note that in your letter of June 21, 1948, you declined to do this. However, we feel perhaps that you have reconsidered your position in the matter. If you are still disposed not to grant this request then we shall make application to the court.

Very truly yours,

Spillers & Spillers,
By G. C. Spillers, Jr.

GCSjr:lj

Porter & Porter, Attorneys,
630 Equity Building, Muskogee, Okla.

Aug. 11, 1948.

Messrs. Spillers & Spillers, Attys.,
711 Ritz Bldg., Tulsa, Okla.

Gentlemen: As to your letter of August 9, 1948, to us referenced the "Du Pont cases," the only answer we give is that we acknowledge receipt of the letter, and refer to ours of June 21, 1948.

Yours very truly,

Porter & Porter, Attys.,
John W. Porter, Jr.

PP:jp

No. 1, Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1948

GRACE W. ADKINS, AS ADMINISTRATRIX OF THE ESTATE OF P. V. ADKINS, DECEASED, PETITIONER

v.

E. I. DUPONT DE NEMOURS & CO., INC., RESPONDENT

THE UNITED STATES OF AMERICA, INTERVENOR

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

Cases—Continued

an affidavit of his poverty, and it is, therefore, difficult to understand how the motion for leave to proceed *in forma pauperis* puts the validity of such an agreement in issue. If such an agreement is valid, and a lawyer's affidavit necessary, the affidavit is on file; if the agreement is invalid the attorney would have no contingent interest in the recovery and the affidavit can be disregarded. In either event the requirements of the *in forma pauperis* statute are (on this point at least) fully satisfied. Nevertheless, in view of this Court's direction we shall consider the question.

Section 16 (b) of the Fair Labor Standards Act, as amended (June 25, 1938, c. 676, § 16 (b), 52 Stat. 1069, amended May 14, 1947, c. 52, § 5 (a), 61 Stat. 87; 29 U. S. C. (1946 ed., Supp. I) 216 (b); *infra*, pp. 48–49) provides, in part, that any employer who violates the minimum wage or maximum hour provisions of the Act shall be liable to his employees affected "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated

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consider such a request. We sincerely trust you appreciate our position in this matter, and we likewise respect yours."

It appears that the twelve claimants involved did designate petitioner as their agent, pursuant to Section 16 (b) of the Fair Labor Standards Act, as it read prior to the enactment of the Portal-to-Portal Act of 1947 (June 25, 1938, c. 676, § 16, 52 Stat. 1069; 29 U. S. C. 216 (b), *infra*, pp. 48–49), to maintain the action for them "for a consideration contingent upon recovery." The right to designate such an agent has since

damages" and that the court, in addition to any judgment awarded to such employees for those sums, shall "allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." We assume that there could be no question of the validity of a contingent fee agreement in a Fair Labor Standards Act suit if the fee were so limited that in no event would the return to counsel exceed the court's allowance. Although the contingent fee is apparently still illegal in England and is regarded with disfavor even in some quarters in this country (see Smith, *Justice and the Poor* (1924), pp. 85, 86; Cohen, *The Law—Business or Profession?* (1924), p. 206), it is now clearly valid in the United States. See Radin, *Contingent Fees in California*, (1940) 28 Calif. L. R. 587.[7] A problem arises only where the

been withdrawn, however (May 14, 1947, c. 52, § 5 (a), 61 Stat. 87; 29 U. S. C. (1946 ed., Supp. I), 216 (b)), and we assume that the Court did not have reference to the validity of such a contingent fee arrangement.

[7] Professor Radin says, in part (p. 598): "* * * It would be better for both the bar and the public if the need for contingent fees was not merely recognized, as it can scarcely help being, but if it was regarded, not as a regrettable decadence from a loftier standard, but as an institution that serves an important purpose * * *." And, again (p. 589): "The case for and against a contingent fee, if we disregard considerations of history and what may be called snobbery, may be briefly summarized. The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of the poverty of the claimants. Of these two possibilities, the social advantage seems clearly on the side of the contingent fee."

agreement contemplates a fee greater than or in addition to the "reasonable" attorney's fee to be awarded by the court. The same problem would appear to be presented if the arrangement between counsel and client provided for a fixed fee greater than that awarded by the court, but in fact the issue has been considered only in connection with contingent fees.

As to those arrangements, there is a diversity of opinion. The weight of authority frowns on such contingent-fee agreements. *Harrington* v. *Emmitt Const. Co.*, 167 F. 2d 389 (C. C. A. 4); *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527 (C. C. A. 2), certiorari denied, 331 U. S. 812; *Maddrix* v. *Dize*, 153 F. 2d 274 (C. C. A. 4); *Burke et al.* v. *Mesta Machine Co.*, Civ. No. 2744, U. S. Dist. Ct., W. D. Penna., July 27, 1948, 15 Labor Cases (CCH), par. 64,673. There is, however, some respectable authority to the contrary. *Hutchinson* v. *William C. Barry, Inc.*, 50 F. Supp. 292 (D. Mass.); *Aucoin* v. *Mystic Waste Co.*, 55 F. Supp. 672 (D. Mass.); *Monty* v. *Christiansen*, 47 F. Supp. 273 (D. Wisc.); *Miller* v. *Fox-Pelletier Intern. Detective Agency*, No. 1259, W. D. Tenn., June 11, 1947, 13 Labor Cases (CCH), par. 64,167; *S.-H. Robinson & Co.* v. *Larue*, 25 Tenn. App. 284, affirmed, 178 Tenn. 197; *Fiedler* v. *Potter*, 180 Tenn. 176.

All the reported decisions in opposition to the contingent fee arrangement are grounded on a respect for the presumed intent of Congress that

"the employee * * * collect and retain not only the amount of wages due and an additional sum of equal amount as liquidated damages, but also a sufficient sum to pay his lawyer * * *." *Harrington* v. *Empire Const. Co.*, 167 F. 2d 389, 392 (C. C. A. 4). A private contract for payment over of any part of the wages and liquidated damages to counsel or to anyone else is deemed a frustration of that congressional purpose. In the *Harrington* case, *supra*, the court thought that the legislative design was "obvious" (167 F. 2d at 392) and conditioned the payment of the attorney's fee allowed on the surrender by employee's counsel of all rights to additional compensation under a private retainer agreement. Similarly, in *Maddrix* v. *Dize*, 153 F. 2d 274, 275–276, the same court considered it obvious that "Congress intended that the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs." In *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527, 531, the Second Circuit Court of Appeals, though it found that the question was not properly before it, expressed "considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that an employee's recovery should be net, and that therefore the lawyer's compensation should come solely from the employer."

There is some, though little, support for this position in the legislative history of Section 16

(b). The section first appeared in the bill as it was reported by the Conference Committee of both Houses, but the report of that committee makes no reference to the provision for attorney's fees. H. Rep. No. 2738, 75th Cong., 3d sess. In the debates prior to the adoption of the conference report, however, Representative Keller did refer to the provision, as follows (83 Cong. Rec. 9264):

> Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit * * *.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, such remarks and the policy considerations underlying the enactment of the Fair Labor Standards Act were said to denote a jealous regard on the part of Congress for securing to the employee, unabridged by private waiver or other agreement, the full amount of the minimum and overtime wages and liquidated damages to which the Act entitled him. By the same token, it

would seem that any contingent fee contracts contemplating a payment over to his attorney of some portion of his recovery must be rejected. The opposing viewpoint is expressed in the opinion of Judge Wyzanski in *Hutchinson* v. *William C. Barry, Inc.*, 50 F. Supp. 292, 297 (D. Mass.): "Unlike workmen's compensation acts and similar legislation * * * [the Fair Labor Standards] Act does not limit the lawyer's fee." See, *e. g.*, Act of June 7, 1924, as amended, 38 U. S. C. 551; *Hines* v. *Lowrey*, 305 U. S. 85. The silence of Congress in that regard suggests that no limitation whatever was intended. It is true that Section 16 (b) provides that only a "reasonable" attorney's fees shall be allowed, but that limitation may be applicable only so far as the judgment against the employer is concerned. The courts which see no fault in the private fee agreement in Fair Labor Standards Act suits view the matter of the attorney-client relationship as quite separate and apart from the question as to the statutory liability of the employer. Various justifications for such a construction are suggested (*Hutchinson* v. *William C. Barry, Inc.*, 50 F. Supp. 292, 297 (D. Mass.)):

> * * * The plaintiff by recovering double damages gets what is in practice, though not in theory * * *, more likely to be a windfall than a compensation for damages suffered. The attorney's fee is a further addition to the amount payable to

> the plaintiff, not * * * to the attorney. And the plaintiff, by virtue of the double damage award, already has margin enough to pay his counsel's fee. Moreover, the rights of counsel are not foreclosed by a decision under Section 16 (b) of the Act. * * * A lawyer can make private arrangements with his client for a fee larger than the Court orders the defendant to pay * * *."[8]

As a practical matter, it may well be that unless contingent fees in addition to or in excess of the courts' awards are permitted, many meritorious claims of employees will go by the board. A study of the cases leads one recent commentator to conclude that "the primary factor influencing the size of the fee is the attitude of the

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[8] To the same effect is *Aucoin* v. *Mystic Waste Co.*, 55 F. Supp. 672, 673 (D. Mass.), where in fixing an attorney's fee in another Fair Labor Standards Act case, the court disposed of an antecedent agreement between the plaintiff and his attorney as follows:

"* * * The Fair Labor Standards Act does not in terms prohibit an employee from paying or an employee's lawyer from charging more than a court awards as a reasonable attorney's fee. However, where the agreement between the employee and his counsel sets a figure higher than what the court considers a reasonable attorney's fee, the agreement is not relevant. Where the agreement sets a figure lower than what the court considers a reasonable attorney's fee, it may be that the employee cannot recover from the employer an attorney's fee in excess of the agreement between the employee and his counsel. The excess would not represent damages sustained by the employee and, therefore, it might not fall within the provisions of the act for a reasonable attorney's fee."

court toward the FLSA generally and the rule of law governing the case in particular." Gerber and Galfand, *Employees' Suits Under the Fair Labor Standards Act* (1947), 95 U. Penna. L. R. 505, 532. The court's attitude toward the plaintiff is also an important factor. *Id.*, at 532–533; see, *e. g., S. H. Robinson & Co.* v. *Larue,* 178 Tenn. 197, in which only $1 attorneys' fee was allowed. In view of the uncertainties in the size of the fees allowed, which such irrelevant considerations must inevitably engender, it has apparently "become general practice for attorneys to insure themselves against low court-awarded fees by separate fee contracts with the plaintiffs * * *." *Id.*, at 536. If such protective arrangements are outlawed, lawyers may be loath to risk losses in prosecuting Fair Labor Standard Act claims.

An equally significant consideration is the fact that the average wage-earner usually does not feel that he has sufficient funds to enable him to retain an attorney on a fixed fee, payable whether or not the suit is successful; consequently, he must resort to a contingent fee arrangement. See Brown, *Lawyers and the Promotion of Justice* (1938), pp. 207–218. The attorney's risk of loss under such an arrangement, if the suit is lost, is, of course, taken into account in determining the size of the contingent fee, which consequently is bound to be somewhat higher than one which would be payable for similar services, win or lose. Cf. *Taylor* v. *Bemiss,*

110 U. S. 42, 45. Unless the "reasonable" fee allowable under Section 16 (b) is to reflect this increment, attorneys are likely to refuse to handle Fair Labor Standards Act suits except on a contingent fee basis. If it is to reflect the increment, however, employers will be subjected to what is perhaps an unfair penalty for the penury of their employees.

Such contingent agreements should at all times be subject to the surveillance of the courts. *Taylor* v. *Bemiss,* 110 U. S. 42; *Ridge* v. *Healy,* 251 Fed. 798 (C. C. A. 8). Thus, the employee would in large measure be protected against extortionate arrangements. On the other hand, if all agreements for contingent fees in addition to or in excess of court-awarded fees were outlawed, he might, as a practical matter, find it difficult to procure adequate legal services.

The Administrator of the Wage and Hour Division has advised the Department of Justice that he feels the question of the validity of the contingent fee agreement has "too remote a bearing on the duty of administering and enforcing the Act to warrant his taking any position." We have presented the authorities and the arguments on both sides of the question for the information of the Court.

II

THE NECESSITY FOR AN ATTORNEY'S AFFIDAVIT OF POVERTY

The *in forma pauperis* statute, as it read at the time the motion pending here was filed, pro-

vided that any citizen might procure leave from any court of the United States to proceed *in forma pauperis,* "upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal * * *." Act of July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended; 28 U. S. C. (1946 ed.) 832, *infra*, p. 46. Literally, this would seem to require affidavits only from the parties to the litigation, but the courts have nevertheless applied the statute to require affidavits also from all other persons directly interested in the recovery. Where "the action is prosecuted for the joint benefit of several persons, the petition to proceed *in forma pauperis* is insufficient unless each person directly interested in recovery makes the poverty affidavit required by the statute * * *." *In re American Mounting and Dye Cutting Co.*, 126 F. 2d 419 (C. C. A. 8); *Carter* v. *Kurn*, 120 F. 2d 261 (C. C. A. 8); and, see, to same effect, *Boggan* v. *Provident Life and Accident Insur. Co.*, 79 F. 2d 721 (C. C. A. 5); *Reed* v. *Pennsylvania Co.*, 111 Fed. 714 (C. C. A. 6); *Clay* v. *Southern Ry.*, 90 Fed. 472 (C. C. A. 6).

Thus, it seems clear that before petitioner could be allowed to prosecute her appeal *in forma pauperis* here, affidavits of poverty would have to be filed by the claimants whom she represents as agent. For, as stated in the complaint

(par. 3), this action was instituted and has been prosecuted "for and on their behalf"; petitioner's interest is only indirect, and her success is wholly dependent on the merits of their claims.[9]

When petitioner made her first applications for leave to proceed *in forma pauperis* to the District Court and Court of Appeals, it was apparently suggested that the requirements of the statute might not have been fully satisfied because petitioner's attorney had failed to submit an affidavit as to his poverty. Both courts below were of the opinion that such an affidavit was necessary where an applicant's attorney was retained on a contingent fee basis. But, as already noted, *supra*, pp. 14–15, the record does not show whether such a contingent fee agreement was entered into here. Furthermore, even if such an arrangement were made, petitioner's counsel has

[9] Eleven of the employees petitioner represents have executed affidavits of poverty, and if those affidavits are sufficient in content—a matter we shall consider below—there seems to be no reason why the refusal of the twelfth claimant to join should prejudice any claim other than his own. We suggest, therefore, contrary to the holding of the District Court, that V. J. Blevins' failure to submit an affidavit as to his inability to advance the costs of the appeal may prevent the prosecution of the appeal on his behalf *in forma pauperis*, but that the appeal on behalf of the other eleven claimants should be unaffected by his silence. But cf. *Walker* v. *Equitable Mtge. Co.*, 114 Ga. 862, 866–867; *Ostrander* v. *Harper*, 14 How. Prac. (N. Y. Sup. Ct.) 16, 17–18.

an affidavit on file, and the issue as to its necessity, therefore, need not be decided.[10] Nevertheless, since the questions raised by the motion for leave to proceed *in forma pauperis* are not defined and since this very question was apparently considered below, we discuss it here.

The majority of the decisions in point have required the filing of an affidavit by a contingent fee attorney. *United States ex rel. Randolph* v. *Ross*, 298 Fed. 64 (C. C. A. 6); *Bolt* v. *Reynolds Metal Co.*, 42 F. Supp. 58 (W. D. Ky.); *Esquibel* v. *Atchison, T. & S. F. Ry. Co.*, 206 Fed. 863 (D. N. M.); *Feil* v. *Wabash R. Company*, 119 Fed. 490 (W. D. Mo.); *Phillips* v. *Louisville and N. R. Co.*, 153 Fed. 795 (C. C. N. D. Ala.); *The Bella*, 91 Fed. 540, 543 (D. Wash.); *Boyle* v. *Great Northern Ry. Co.*, 63 Fed. 539 (C. C. D. Wash.); *Gomez* v. *Superior Court of Los Angeles County*, 134 Cal. App. 19; *Silvas* v. *Arizona Copper Company*, 213 Fed. 504, 507–508 (D. Ariz.); Rule 26 (1), Rules of United States Circuit Court of Appeals for the Third Circuit; Rule 18 (2), Rules of United States Circuit Court of Appeals for the Sixth Circuit; *Chetkovich* v. *United States*, 47 F. 2d 894 (C. C. A. 9), but see *Deadrich* v. *United States*, 67 F. 2d 318

[10] If this Court concludes that a contingent fee arrangement would be invalid in a Fair Labor Standards Act suit, the attorney would have no interest in the recovery and would not have to file an affidavit of poverty.

(C. C. A. 9). There is, however, considerable authority to the contrary. *Quittner* v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331 (C. C. A. 2); *United States ex rel. Payne* v. *Call*, 287 Fed. 520 (C. C. A. 5); *Jacobs* v. *North Louisiana and Gulf R. R. Co.*, 69 F. Supp. 5 (W. D. La.); *Clark* v. *United States*, 57 F. 2d 214 (W. D. Mo.); *Evans* v. *Stivers Lumber Co.*, 2 F. R. D. 548 (E. D. Tenn.); *Stevens* v. *Sheriff*, 76 Kans. 124; *Loftin* v. *Frost-Johnson Lumber Co.*, 133 La. 644; *State ex rel. Malouf* v. *Merrill*, 165 Wisc. 138; *Hogg* v. *Chicago and Alton R. R. Co.*, 168 Ill. App. 609, 613–614. So far as we have been able to ascertain, this Court has never expressed an opinion on the question.

We submit that the minority rule is correct. Those courts which require the filing of an affidavit by an attorney employed on a contingent fee basis premise their holding on an analogy which they assume between the interest of such an attorney and those of the beneficiaries of decedents' estates (see, *e. g., Carter* v. *Kurn*, 120 F. 2d 261 (C. C. A. 8)) or of the creditors of bankrupt estates (see, *e. g., In re American Mounting and Dye Cutting Co.*, 126 F. 2d 419 (C. C. A. 8)). In their view, such a contingent fee attorney is "a person who acquires by contract an interest in * * * [the] litigation, and a right to share in the fruits of a recovery" and is, therefore, not entitled to sue *in forma pauperis* and, thus, be permitted "under cover

of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people." *Boyle* v. *Great Northern Ry. Co.*, 63 Fed. 539 (C. C. D. Wash.). To the suggestion that the rule they announce is, in effect, a compulsion of champertous practice, these courts respond either that the state statutes in point do not prohibit the payment of costs by an attorney or that the mere filing of a cost bond by an attorney is but a guarantee of his client's obligation to pay the costs and not payment on the attorney's account. *United States ex rel. Randolph* v. *Ross*, 298 Fed. 64, 65–66 (C. C. A. 6).

There are, however, some states where an agreement by attorneys to defray the costs of litigation would be against public policy and would constitute an illegal champertous agreement. See *Quittner* v. *Motion Picture Producers & Distributors of America*, 70 F. 2d 331 (C. C. A. 2).[11] In such states, then, a poor plaintiff unable to advance the costs or to secure their payment would be put to the choice of finding himself equally poor counsel or of foregoing his lawsuit. And to suggest, as some courts do (see *United States ex rel. Randolph* v. *Ross*, 298 Fed. 64, 65–66), that,

[11] The status of such an agreement in Oklahoma, of whose bar petitioner's counsel is a member, is doubtful. The applicable statute, 21 Okla. Stats. Anno. § 559, would seem to prohibit an arrangement of that character. But the statute apparently is based on an old Dakota provision (Comp. Laws Dak. 1887, § 6397), and that provision has been held to permit such an agreement. *Woods* v. *Walsh*, 7 N. D. 376.

in any event, it would not be champertous for the attorney to file a cost bond or lend the money for payment of the costs to his impoverished client is, in our opinion, to blink at the facts; for it should be plain, especially to the attorney, that unless the suit proves successful there would be little likelihood that the "loan" would be repaid.

Since attorneys of means might not be willing to assume the burden of the costs themselves, to deny to litigants who have retained counsel on a contingent fee basis the right to proceed *in forma pauperis* unless their attorneys sign affidavits of poverty would often be to relegate indigent parties to pauperized attorneys. We submit that that is a perversion of the humane purpose underlying the *in forma pauperis* statute: "to assist the poor and afford an opportunity to prosecute their just claims where, if they met the costs of litigation, it would be prohibitive. It would conflict with the phrase of the statute and surely with its spirit to say that not only must the litigant who sues show himself to be a pauper, but that his attorney must be found in the same category. The statute was intended for the benefit of those who are too poor to give security for costs; it was not intended to compel pauper lawyers to represent them; it is an affront to the dignity of the profession to think otherwise." *Quittner* v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331, 332 (C. C. A. 2).

Nor are we impressed by the fear which some announce that to excuse the contingent fee attorney from making the affidavit of poverty would result in the "greater evil" of "opening the door to litigation which may or may not prove meritorious." *United States ex rel. Randolph v. Ross*, 298 Fed. 64, 66 (C. C. A. 6). We have found no data which would lead one to conclude that there is a greater incidence of unworthy litigation among the poor than there is among those easily able to afford the expense of a lawsuit. To the contrary, such studies as have been made of the effect of poverty on litigation suggest that there is much greater danger to society in discouraging small causes than in encouraging them by liberalizing the requirement for court costs. See Pound, *Organization of Courts* (1940), p. 263; Willoughby, *Principles of Judicial Administration* (1929), pp. 569–575; Maguire, *Poverty and Civil Litigation* (1923), 36 Harv. L. R. 361, 400–404; Pound, *The Administration of Justice in the Modern City* (1913), 26 Harv. L. R. 302, 315–321; Smith, *Denial of Justice* (1919), 3 Jour. Am. Jud. Soc. 112, 115, 126; Theophilus, *The Small Wage Earner in Legal Trouble* (1939), 205 Ann. Am. Ac. Pol. Soc. Sc. 43, 49.

If the Court considers that the question is in the case, then, we believe it should declare unequivocally that attorneys, solely by reason of their professional interest in litigation, whether

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 1, Miscellaneous

GRACE W. ADKINS, AS ADMINISTRATRIX OF THE ESTATE OF P. V. ADKINS, DECEASED, PETITIONER

v.

E. I. DUPONT DE NEMOURS & CO., INC., RESPONDENT

THE UNITED STATES OF AMERICA, INTERVENOR

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinions were announced below.

JURISDICTION

The order of the United States Court of Appeals for the Tenth Circuit denying petitioner's second application to appeal in forma pauperis was entered on January 5, 1948. The petition for a writ of certiorari, incorporating the motion for leave to proceed in forma pauperis and an application for an extension of time to docket the

record on appeal in the Court of Appeals, was filed on February 2, 1948. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED[2]

1. Whether a contingent fee agreement in a Fair Labor Standards Act suit is valid.

2. Whether it was necessary for an attorney retained on a contingent fee agreement to file an affidavit of his poverty in order to secure for his client leave to proceed *in forma pauperis* in accordance with the Act of July 20, 1892, as amended (28 U. S. C. (1946 ed.) 832–836).

3. A. Whether an affidavit of poverty submitted in support of an application for such leave must set forth in detail the financial condition of the affiant.

B. Whether, when a number of persons have a joint interest in an appeal, it is sufficient, to qualify under the *in forma pauperis* statute, for

[1] Effective September 1, 1948, that section was repealed and incorporated in the new Title 28, United States Code, as Section 1254 thereof. See Act of June 25, 1948 (P. L. 773, 80th Cong., 3d Sess.), sections 1, 38, 39. Jurisdiction to issue a writ of certiorari seems clear, but the authority of the Court may stem not from Section 240 (a), but rather from Section 262 of the Judicial Code (now incorporated in Section 1651 of the new Title 28). *Steffler* v. *United States*, 319 U. S. 38.

[2] It is doubtful whether Questions 1 and 2 are, in fact, in this case. See Discussion, *infra*, pp. 14–16, 26–27. The Court, however, has explicitly requested argument of Question 1, and Question 2 is suggested by the petition for certiorari.

each individually to file an affidavit that he cannot pay the total cost of appeal, or whether a showing that the group as a whole cannot bear the cost is necessary.

C. Whether an indigent can require the Government to pay for unnecessary portions of the record on appeal.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 46–49.

STATEMENT [3]

This action was brought in May, 1946, in the United States District Court for the Northern District of Oklahoma, by P. V. Adkins, as agent for twelve named claimants,[4] against the respondent company, a wartime Government cost-plus-a-fixed-fee contractor. Instituted pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, § 16, 52 Stat. 1069, amended May 14, 1947, c. 52, § 5 (a), 61 Stat. 87; 29 U. S. C. (1946 ed., Supp. I) 216 (b)), the suit sought unpaid overtime compensation, liquidated damages, and attorney's fees in connection with

[3] The Statement is based, in most part, on the typewritten copies of pleadings, orders, letters, and other papers appended to the petition for certiorari.

[4] According to petitioner, Mr. Adkins had been designated and employed by these claimants to prosecute their wage claims "for and on a consideration of a certain percentage of any * * * recovery made."

so-called portal-to-portal claims for travel and "make ready" activities performed since January 1, 1942 in and about respondent's ordnance plant near Pryor, Oklahoma.

After respondent's answer had been filed, the case was referred to a special master, and, on April 22, 1947, after a hearing of some two weeks, he reported that all the claimants' activities which might otherwise be compensable were subject to the *de minimis* doctrine enunciated by this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and were, therefore, not compensable. Meanwhile, P. V. Adkins had died, and on April 9, 1947, with the consent of all parties, petitioner, his wife, was substituted in his stead.

On May 14, 1947, while the master's report was pending before the court, the Portal-to-Portal Act of 1947 (c. 52, 61 Stat. 84, 29 U. S. C. (1946 ed., Supp. I, 251–262)) was enacted, and respondent promptly invoked its provisions as an added defense to the suit. Petitioner thereupon filed a motion requesting a declaration that the Act was unconstitutional, and the court, pursuant to the Act of August 24, 1937 (50 Stat. 751, 28 U. S. C. (1946 ed.) 401), certified to the Attorney General that its constitutionality had been drawn in question. Granted leave to intervene, the United States, on September 10, 1947, filed its brief in support of the Act, urging, nevertheless, that if the court had any serious doubts as to its constitutionality and if it sustained the factual find-

ings of the special master, it should dismiss the action, without ruling on the constitutional question, under the *de minimis* doctrine.

On September 24, 1947, after hearing, the District Court concluded that the Portal-to-Portal Act was constitutional and that it deprived the court of jurisdiction, and, consequently, the court entered an order dismissing the action for want of jurisdiction. On October 8, 1947, petitioner's motions for a new trial and for amendment of the pleadings to conform to the evidence were denied, and on the same day the costs were taxed, in an amount of approximately $140.00 against petitioner, and in an amount of approximately $9,500.00 (the special master's fee and the cost of transcribing the record) against respondent. Petitioner then filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit.

It was at this point that petitioner's efforts to proceed *in forma pauperis* began. An application filed in the District Court sought leave to proceed with the appeal as a poor person because of the substantial expense involved in transcribing and printing the voluminous record designated and because of her financial condition, which rendered her unable to advance or to secure the costs of preparing that record. Petitioner stated that she was 74 years of age and the sole beneficiary of Mr. Adkins' estate, consisting of her dwelling house, appraised at $3,450; that

her only source of income and means of support was the rent she received on portions of this house; and that all of her income was required to provide her with the necessities of life. On November 4, 1947, the District Court, without hearing, denied the application. In a letter of that date addressed to petitioner's attorney, District Judge Savage wrote:

> This affidavit is not sufficient. See *Carter* v. *Kurn*, 120 F. 2d 261. In addition, with respect to necessity of counsel employed on a contingent fee basis executing the affidavit see *Chetkovich* v. *United States*, 47 F. 2d 894 and *De Hay* v. *Cline*, 5 F. Supp. 630.

Petitioner thereupon filed a similar appliction with the United States Court of Appeals for the Tenth Circuit, but on November 17, 1947, that court likewise denied her leave to appeal *in forma pauperis*. No reasons were assigned for that action, but on November 28, 1947, Circuit Judge Phillips addressed a letter to petitioner's attorney, apparently in response to a letter from him, suggesting the reasons for the court's action:

> * * * it appears * * *, that, in addition to Adkins, twelve other plaintiffs and the members of your firm, because of a contingent fee contract, are interested in the recovery and that such interests are direct. Cases construing 28 U. S. C. A. 832 hold that every person directly inter-

ested in the recovery must make the poverty affidavit required by the statute.

Even if the recovery of the twelve interested plaintiffs is not joint, the members of the firm would have to join in the affidavit if only one of the real parties in interest appeals. * * *

On or about December 18, 1947, petitioner filed a second application in the District Court for leave to proceed with the appeal *in forma pauperis*. This time, however, in addition to reaffirming her prior affidavit, petitioner annexed affidavits of ten of the twelve claimants involved, in each of which the affiant stated his belief that the action was just and that he should recover; that he was a citizen of the United States; and that "because of my poverty I am unable to pay or give security for the costs ($4,000) of such appeal and still be able to provide myself and my dependents with the necessities of life."

An affidavit of John W. Porter and John W. Porter, Jr., the attorneys constituting the law firm which was counsel of record for petitioner, was also submitted. The attorneys stated that they felt the action was meritorious and that petitioner should recover; that the costs of appeal had, however, been estimated at approximately $4,000; that the total liquid assets of the law firm did not exceed $2,000; that although the law firm had accepted employment as counsel for petitioner, John W. Porter, Jr. had done and would continue

to do substantially all of the work in the case, and the firm had assigned to him all right, title, and interest to any fees resulting from the litigation; and that John W. Porter, Jr., "because of his poverty, * * * is unable to pay or give security for said costs of appeal and still be able to provide himself and his dependents with the necessities of life." Petitioner explained that efforts to locate one of the twelve claimants, one John A. Hodges, had been unsuccessful, and that another, one V. J. Blevins, had refused to execute an affidavit, stating that if that were necessary, the appeal would have to go on without him.

A hearing was accorded petitioner on this second application, but on December 22, 1947, the District Court again denied her leave to appeal *in forma pauperis* on the grounds that she had offered no evidence in support of her application; that all of the claimants had not filed affidavits of poverty; and that the affidavits filed were "not sufficient in that they do not sufficiently set forth the financial condition of said plaintiffs as to whether said affiants are or are not without property, the substance of the affidavits being merely that it would constitute a hardship on said affiants to pay or secure the payment" of the $4,000 costs.

The transcript of the oral argument before the District Court shows that the court was also of the opinion that all the parties interested in the recovery "have at least got to chip in to the extent of their ability to pay; and whatever they

have, they have got to put in the pot for the purpose of taking the appeal". The court's oral remarks show that he was of the opinion that it was clearly insufficient for each affiant merely to state that he could not spend $4,000 personally, since such a "statement does not disclose complete inability * * * to at least pay a portion of the costs of this appeal." The court also stated that "the only thing I passed on was the constitutional question. I dismissed this case for lack of jurisdiction", without making findings of fact on the factual questions; the alleged expense of $4,000 for a transcript of the entire record on appeal was thus "wholly unnecessary"; and for that reason "I am persuaded to be more technical and more strict about requiring you to comply with the statute than I might be under other circumstances. I am satisfied that you can take a proper appeal that will preserve every question in this case that has been passed on by this Court at a rather nominal expense if you would ask for the right kind of a record".[5]

[5] The court pointed out that if the appellate court reversed on the legal issues it would be necessary to have the case remanded for the making of further findings of fact: "I can't see any necessity, under any circumstances, for you to take up this voluminous record to the Circuit Court of Appeals, in taking an appeal in this case in view of the fact that the case was dismissed by the Court solely upon the ground that the Court was deprived of jurisdiction to proceed further by virtue of the provisions of Section 2 of the Portal-to-Portal Act."

Petitioner again filed an application with the United States Court of Appeals for the Tenth Circuit, annexing the affidavits submitted to the District Court and in addition one of John A. Hodges, who had since been located, similar to those made by his fellow claimants. On January 5, 1948, the Court of Appeals entered an order denying this second application; no reasons for the denial were assigned.

On February 2, 1948, petitioner filed the petition for a writ of certiorari, incorporating therein a motion for leave to proceed in this Court *in forma pauperis* and an application for an extension of time to docket the record in the Court of Appeals. Since the issue of the constitutionality of the Portal-to-Portal Act was not raised by the petition, motion, or application, and the petition seemed concerned solely with the propriety of the denial of leave to petitioner to proceed in the Court of Appeals *in forma pauperis*, the United States waived its right to file a reply to the petition for certiorari. On June 1, 1948, this Court entered an order stating that it desired to hear argument on the questions presented by the motion for leave to proceed *in forma pauperis*, "including the question as to the validity of a contingent fee agreement in connection with a suit brought pursuant to the Fair Labor Standards Act."

SUMMARY

I

The cases are not in agreement as to whether a contingent fee arrangement is permitted under Section 16 (b) of the Fair Labor Standards Act. This brief reviews the authorities, and presents the arguments on both sides of the question.

II

There is also a diversity of opinion as to whether it is necessary for an attorney retained on a contingent fee basis to file an affidavit under the *in forma pauperis* statute. We believe that to require an attorney's affidavit of poverty is, in effect, to sanction a champertous practice under which attorneys would be encouraged to pay the costs of litigation in return for a contingent interest in the recovery of their poor clients. Moreover, to deny litigants who have retained counsel on a contingent fee basis the right to proceed *in forma pauperis* in the absence of such affidavits of counsel is to relegate indigent parties to pauperized attorneys. This is a perversion of the purpose underlying the *in forma pauperis* statute, and is obviously unfair to the needy litigant.

III

A. Although most of the affidavits filed here in support of the application for leave to proceed *in forma pauperis* do not set forth the financial condition of the affiants in detail, it is

questionable whether they are for that reason alone insufficient to satisfy the requirements of the *in forma pauperis* statute. The statute does not provide that the applicant's insolvency must be particularized, and some courts have held that the mere paraphrasing of the statutory language, as in the affidavits here, is enough to satisfy the statute. A better procedure might be for the court to investigate the financial responsibility of the applicant and his supporting affiants at the outset even as it now investigates the merits of the case sought to be prosecuted *in forma pauperis*. Such a procedure might more appropriately be required by court rule than retroactively in a particular litigated case.

B. The affidavits in this case each state merely that each affiant cannot pay the $4,000 estimated cost of appeal; there is no allegation that the interested affiants as a group are unable to pay the costs, or that any of them is unable to pay his proportionate share of the costs. Such averments should not be sufficient under the *in forma pauperis* statute. Before the Government is required to pay the costs of litigation, it should appear that the interested parties together are unable to do so.

C. The trial court believed the estimate of $4,000 costs grossly excessive, since there was no need for bringing the evidence before the appellate court in view of the narrow basis of the trial court's decision. A district court must have dis-

cretion to limit a party seeking to appeal *in forma pauperis* to those portions of the record which can be reasonably deemed to be necessary to the appeal, and thus to prevent abuse of the *in forma pauperis* privilege at the expense of the public. Where the affidavits show inability to pay costs excessively estimated, the parties should be given an opportunity to show, if they can, inability to pay the costs found by the trial court to be reasonably necessary to the appeal.

DISCUSSION

The Court has invited argument on "the questions presented by the motion for leave to proceed *in forma pauperis,* including the question as to the validity of a contingent fee agreement in connection with a suit brought pursuant to the Fair Labor Standards Act." What questions are raised by the motion, however, is not clear; indeed, the one question explicitly stated by the Court may not be in the case at all. Nevertheless, in view of the Court's order, we address ourselves initially to the issue which it has stated, and, thereafter, to several questions which apparently were considered in the lower courts and which are suggested by the pending motion—first, whether an affidavit of the poverty of an attorney retained on a contingent fee basis is necessary on an application by his client to proceed *in forma pauperis;* second, whether such affidavits as are filed must contain details as to the financial con-

dition of the affiants; and, third, whether the affidavits in this case were sufficient.

The Government's intervention in the District Court was limited to the issues of the constitutionality of the Portal-to-Portal Act and the application of the *de minimis* doctrine under the Fair Labor Standards Act. On the application for leave to proceed *in forma pauperis* in the District Court the United States Attorney suggested that the affidavits of poverty were insufficient, particularly since he thought that only a small record, not costing anything like $4,000, was necessary on the appeal. The Government did not participate in the *in forma pauperis* proceeding before the Court of Appeals. The issues now presented to this Court relate primarily to the application of the *in forma pauperis* statute and, in one respect, to the construction of the Fair Labor Standards Act. The interest of the United States in these issues is a general one, not affected by the circumstance that the Government was an intervenor below on the merits. This brief is accordingly submitted as a disinterested, objective discussion of the issues under review, in the hope that it may aid the Court in its consideration of the case.

I

THE VALIDITY OF CONTINGENT FEE AGREEMENTS IN FAIR LABOR STANDARD ACT CASES

There is considerable doubt whether the question of the validity of contingent fee agreements in Fair Labor Standard Act cases is, in fact,

presented by the pending motion. Neither the petition for certiorari, the motion, nor any of the papers filed in support thereof discloses the existence of such an agreement.

The judge of the District Court, in his letter of November 4, 1947, did refer to the rule requiring counsel employed on a contingent fee basis to execute an affidavit of poverty, but he did not say whether or not there was such employment here. And although Circuit Judge Phillips, in his letter of November 28, 1947, stated that it appeared that there was such a contingent fee agreement, we do not know where he got that information. It is noteworthy that the petition itself seems to negative any such arrangement: "the record is entirely void of any evidence of any contingent fee interest of Counsel."[6] Moreover, even if there were a contingent fee agreement here, petitioner's attorney has filed

[6] It was this statement which impelled the Solicitor General to write petitioner's counsel, on August 17, 1948, requesting advice "as to the exact nature of your interest as attorney and plaintiff's interest as agent for the other claimants in the litigation. We do not, of course, need to know the percentage or dollar and cent figures, but information at least as to the pattern of the fee and agency arrangements is essential." Petitioner's counsel responded to the Solicitor General as follows:

"We have your letter of Aug. 17th seeking information as to any fee arrangements in this matter, and we are indeed surprised at what you have to say in view of your status in the matter. Even so, we do not see where your request is necessitated by the Court's order setting the matter for hearing, and for that reason alone we would not see fit to further

it be in the nature of a contingent fee or otherwise, need not file affidavits of poverty in connection with applications for leave to prosecute such litigation *in forma pauperis*.

III

THE SUFFICIENCY OF THE AFFIDAVITS OF POVERTY FILED

If it is determined that all affidavits required by the *in forma pauperis* statute have been filed by petitioner, there still remains the question whether the showing required by the statute has been made. Petitioner's affidavit, made in October, 1947 and filed with her first application, states that she is "74 years of age and is the sole beneficiary of the Estate of P. V. Adkins, deceased," that "her only source of income and means of support is the renting out of portions of her home which constitutes said Estate appraised at $3,450, said home being located at 820 Callahan Street in the City of Muskogee, Oklahoma," and that all of her income "is used and required in providing her the necessities of life." The affidavits filed by eleven of the twelve claimants in connection with the second application contain no details whatever; each states that the affiant believes that the action is "just and that we should recover," but that because of his poverty he is "unable to pay or give security for the costs ($4,000.00) of such appeal and still be able to provide * * * [himself] and * * * [his]

dependents with the necessities of life." An affidavit similar in substance as to the allegation of poverty was made by petitioner's attorney.

So far as we know, no one has questioned the truth of the averments in the several affidavits. Nevertheless, the District Court held them inadequate. In its order denying petitioner's second application for leave to proceed as a poor person, the court found that the affidavits were "not sufficient in that they do not sufficiently set forth the financial condition of said plaintiffs as to whether said affiants are or are not without property, the substance of said affidavits being merely that it would constitute a hardship on said affiants to pay or secure the payment of the sum of Four Thousand Dollars ($4,000.00) for the making of a record in this cause." During the course of the hearing on this application, the court suggested that what must be shown is a "complete inability * * * to at least pay a portion of the costs of this appeal * * *. The showing must not only reflect a lack of funds to pay all costs, but likewise a lack of funds to pay any part of the costs * * *."

A. THE SUFFICIENCY OF A GENERAL AFFIDAVIT

Is a court within its discretion when it denies an application for leave to proceed *in forma pauperis* because the affidavits do not recite the financial condition of the affiants in detail, where no question is raised as to their veracity? The

discretion of a court to grant or deny such an application is broad (*Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45-46), but it is by no means absolute and uncontrolled. *Ex parte Rosier*, 133 F. 2d 316, 330, 334 (App. D. C.). Thus, "it would be a clear abuse of discretion for a trial court to reject an application to commence an action *in forma pauperis*, the truth of the allegations of poverty in which was not contested and which on its face stated a cause of action and which contained nothing on its face indicating that it was frivolously or vexatiously filed." *Id.* at 331.

The statute, as it read at the time the motion pending here was filed, prescribed no fixed procedure; all that was necessary, so far as the applicant was concerned, was that he make "a statement under oath in writing, that because of his poverty he is unable to pay the costs * * * or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal" (28 U. S. C. (1946 ed.) 832, *infra*, p. 46).[12] In the light of such a provision and in the absence of any requirement

[12] The new code provision requires an "affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." Section 1915 of the new Title 28, United States Code.

for a particularization of applicant's insolvency, a mere paraphrasing of the statutory language can be regarded as enough to satisfy the statute.[13] And so some courts have held, relying on their power to dismiss the entire case in the event of untruth (28 U. S. C. (1946 ed.) 835, new 28 U. S. C. § 1915 (d), *infra*, p. 47) and the availability of the sanctions against perjury (28 U. S. C. (1946 ed.) 833, *infra*, p. 47) as quite effective deterrents against false affidavits. *Woods* v. *Bailey*, 113 Fed. 390 (C. C. M. D. Penna.); *Ex parte Rosier*, 133 F. 2d 316, 317, 332 (App. D. C.); *McDuffee* v. *Boston & Maine R. Co.*, 82 Fed. 865 (C. C. D. Vt.); cf. *Wickelman* v. *A. B. Dick Co.*, 85 Fed. 851 (C. C. A. 2). Under this view, the denial of petitioner's application because the affidavits filed may have been wanting in detail was unjustified.

Apparently it is the practice for the courts to await some showing by the adverse party that the affidavits are in some respects false before shifting the burden to petitioner to bolster the averments by more specific evidence of poverty. This puts the responsibility for challenging the affidavits on the opposite party. We do not doubt, however, that the court or a representative of the Government (which pays the indigents' costs) has the power to institute in-

[13] Compare the forms of affidavit for leave to sue *in forma pauperis* recommended at 4 Cyc. Fed. Proc. Forms, § 2639; 8 Cyc. Fed. Proc. (2d ed., 1943), § 3678.

quiries on its own to test the truthfulness of the affidavits.

Affidavits setting forth only general conclusions, with no specific facts, are, however, not always trustworthy. A requirement that the details of an affiant's financial condition be revealed would doubtless tend to lessen exaggeration and to increase the likelihood that an affiant was telling the truth when he claimed impoverishment. It would often enable the court to determine from the face of the document and without further inquiry whether a party was entitled to proceed *in forma pauperis*. The use of general affidavits will often necessitate further questioning of the affiant and perhaps other investigation before a court should be satisfied.

Whether the general affidavit should be regarded as sufficient is an arguable question of policy. In view of the authorities holding such affidavits adequate, it would seem more appropriate, if this Court thought a more specific statement desirable in all cases, that it so provide by rule rather than retroactively in a particular case.

If the general statement is sufficient, we submit that the proper practice is for the district court to satisfy itself by oral inquiry or otherwise as to the affiant's financial condition, and not to rely too greatly on the action or inaction of the opposing litigant. The procedure followed by the courts when they examine the merits of the

case sought to be prosecuted *in forma pauperis* furnishes a helpful analogy. There, with or without a challenge from the other parties, a court, on its own motion, will carefully consider whether the litigation is meritorious or whether it is vexatious and frivolous. If the latter, the application to proceed as a poor person will be denied. Cf. *Whittle* v. *St. Louis & S. F. Ry. Co.*, 104 Fed. 286 (C. C. W. D. Ark.); *Brinkley* v. *Louisville & N. R. Co.*, 95 Fed. 345 (C. C. W. D. Tenn.); *Whelan* v. *Manhattan Ry. Co.*, 86 Fed. 219 (C. C. S. D. N. Y.). We can perceive no reason why a court should not likewise simultaneously investigate the financial responsibility of the applicant and his supporting affiants. This would serve to protect the public interest in which the adversary has no immediate concern.

B. THE AFFIDAVITS IN THIS CASE ARE INSUFFICIENT BECAUSE THEY DO NOT STATE THAT ALL THE INTERESTED CLAIMANTS TOGETHER CANNOT PAY THE COSTS OF THE APPEAL

Even if a general affidavit be held sufficient, however, it does not follow that the affidavits in this case are adequate.

We do not suggest that an affiant must aver destitution to avail himself of the privilege. Most of the reported cases imply that this is not necessary. Although some early decisions suggested that one must be absolutely indigent to qualify for the privileges of the *in forma pauperis* procedure, a mere showing of hardship being irrelevant (*Wickelman* v. *A. B. Dick Co.*, 85 Fed.

851 (C. C. A. 2); *Volk* v. *B. F. Sturtevant Co.*, 99 Fed. 532 (C. C. A. 1); see, also, *Fisher* v. *Johnston*, 24 F. Supp. 821 (N. D. Calif.)), the bulk of the cases and the more recent decisions treat inability to pay the particular costs involved as the touchstone.[14] *Jacobs* v. *North Louisiana and Gulf R. R. Co.*, 69 F. Supp. 5 (D. La.); *McDuffee* v. *Boston & Maine R. Co.*, 82 Fed. 865 (C. C. D. Vt.); *Thiel* v. *Southern Pacific Co.*, 159 F. 2d 61 (C. C. A. 9); *Fils* v. *Iberia, St. M. & E. R. Co.*, 145 La. 544, 554; *Scott* v. *Shreveport Rys. Co.*, 192 La. 495; *Gilmore* v. *Rachl*, 202 La. 652; *Carlisle* v. *Wilson*, 103 S. W. 2d 434 (Tex. Civ. App.); *Aguirre* v. *Hanney*, 107 S. W. 2d 917 (Tex. Civ. App.).

But this case presents a special problem, inasmuch as there are twelve claimants (excluding counsel and Blevins) interested in the recovery. Each has filed an affidavit of poverty in which he states that the affiant cannot afford payment of the estimated costs of $4,000. There is no showing, however, that each of them could not pay a

[14] Contemporary decisions suggest a definite departure from the rigorous attitude of Sir John Nicholl, in *Lovekin* v. *Edwards*, 1 Phil. 179, 183–184 (1810):

"To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides it places the adverse party under great disadvantages, it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore to be clearly made out."

proportionate share of those costs, or that all of them together could not pay the total costs. It may be that these eleven affiants are unable to bear a $4,000 cost burden, but they have not so averred. But certainly, as a general matter, when a number of persons are joint plaintiffs or defendants, they are not entitled to be treated as indigents merely because each individual cannot afford to pay the costs of the entire case by himself. Cases, such as stockholders' or employees' suits, in which hundreds or even thousands of persons have a joint interest, are not inconceivable; in such cases the total costs might be very high, but the amount per person insignificant. There is no reason why the public should be saddled with costs in such proceedings.

So far as we have been able to ascertain, there are no reported cases dealing with this problem. But in cases in which several parties have a joint interest, it must be the rule that the group demonstrate that it cannot bear the cost burden. Affidavits such as we have here from each member of the group that he cannot do so are obviously insufficient. Because of their deficiency in this respect, the affidavits in this case would seem to be insufficient even on the assumption that an affidavit in general form is normally adequate.[13]

[13] We have no way of knowing whether, if given permission, affiants can show by additional and more detailed statements that all of them together are unable to pay the estimated $4,000 costs. The District Court indicated orally that

C. WHETHER AN INDIGENT CAN REQUIRE THE GOVERNMENT TO PAY FOR UNNECESSARY PORTIONS OF THE RECORD ON APPEAL

The remarks of the trial judge, referred to at page 9, *supra*, indicate that he was motivated in part by his belief that petitioner was unreasonable in requesting the preparation of the entire record instead of merely those portions which pertained to his ruling dismissing the case under the Portal-to-Portal Act.

That raises the question whether persons claiming rights *in forma pauperis* can require the public to pay for the preparation of portions of the record unnecessary to the appeal. In the ordinary case, where the appellant (or the appellee as losing party) must pay the appeal costs, he has an incentive to minimize the size of the record and not to include within it unnecessary items. The removal of this incentive for the indigent, whose costs are borne by the public, should not mean that he is completely free to enlarge the appellate record irrespective of the necessities of the case. We think it clear that the trial judge must have discretion to prevent such an abuse of the privileges granted under the *in forma pauperis* statute. Cf. *Estabrook* v. *King*, 119 F. 2d 607, 610 (C. C. A. 8), in which the court held that it was not an abuse of the trial court's discretion to deny an indigent an

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this defect was one reason for holding their affidavits insufficient, and they have made no effort to file additional affidavits directed to this particular point.

order compelling a transcript of testimony to be supplied to him at the cost of the Government where petitioner had "set out the substance of the desired testimony in his brief, and it could in no way effect the result here." The recent addition of Rule 75 (m) to the Federal Rules of Civil Procedure would seem to be a recognition of the trial court's discretion with respect to the preparation and settlement of records on appeal in *in forma pauperis* proceedings.

The trial court should, of course, allow counsel for the indigent reasonable latitude in designating the appellate record, and should only exclude material which the court is convinced is unnecessary to the appeal. An arbitrary exercise of discretion on the part of the trial court will, of course, be subject to correction by the appellate tribunal.

If the trial judge has such discretion to exclude unnecessary portions of the record, it follows that he need not allow an appeal *in forma pauperis* to a party who avers merely that he cannot pay the cost of an unnecessarily enlarged record. The trial court should estimate the cost of preparing the necessary record, and give to the alleged indigent an opportunity to show that he is unable to pay the costs found by the court to be reasonably necessary.

In this case, for example, it may be that the petitioner and other affiants jointly cannot pay $4,000 costs—a figure based upon the inclusion

within the record of all the evidence taken before the special master but not considered by the trial judge in his decision that the court has been divested jurisdiction of petitioner's case by the Portal-to-Portal Act. If this evidence were eliminated, the cost of the appeal might be, let us assume, only $400. It does not follow that because the affiants cannot pay $4,000, the eleven of them cannot pay $400. Thus, if the trial court properly concluded that the inclusion of the evidence in the appellate record was unnecessary, he would be required to hold insufficient the affidavits now on file. The appropriate course in such circumstances would seem to be for the trial court to give petitioner an opportunity, if she so desires, to file affidavits with respect to the claimants' joint ability to pay $400, or whatever the amount required to prepare the necessary record might be.

CONCLUSION AND RECOMMENDATIONS

In the present case, we believe the trial court regarded the affidavits of poverty as insufficient *inter alia*, both because the affiants did not show their joint inability to pay costs and because he thought the $4,000 cost estimate grossly excessive in view of the narrow scope of the issues which would be considered on the appeal. It is not clear, however, that he based his decision entirely on those grounds. Petitioner's counsel indicated that he was not certain as to just what she was required to show to qualify *in forma*

pauperis, and the uncertain state of the law on the subject to some extent justifies his confusion.

In the circumstances we believe that this Court should remand the case to the District Court for reconsideration of the entire question in the light of principles to be enunciated by this Court, and that petitioner should be accorded an opportunity to furnish additional evidence of the need for proceeding *in forma pauperis* if she so desires. We submit that this Court should hold that:

1. An attorney's affidavit of poverty is unnecessary even if the attorney has a contingent interest in the recovery.

2. A petitioner *in forma pauperis* must show that all of the parties interested in the recovery jointly are unable to pay the costs of appeal.

3. The showing of inability to pay must relate to the cost of preparing only those portions of the record which can reasonably be thought necessary to the appeal. The trial court should allow counsel considerable leeway in this respect but should see that the *in forma pauperis* privilege is not being abused.

This Court should also indicate, for the guidance of the trial court, what is meant by "inability to pay". Is it sufficient that a party possessing sufficient property to cover the costs cannot pay the costs without lowering his standard of living, that he avers that he is unable to pay the costs "and still be able to provide my-

self and my dependents with the necessities of life"? Is he impoverished if he owns real property worth substantially more than his share of the costs, and does it matter if the property is his dwelling house, or whether it is worth $3,000 or $100,000?

The trial court also suggested that an alleged indigent should pay as much of the costs as he can afford, and that the Government should only be required to pay the remainder. The statute is silent as to this, and the cases have not dealt with it, but such a construction of the act would not be unreasonable. Cf. *Pendley* v. *Berry and Towles,* 95 Tex. 72. It would be helpful generally, as well as to the disposal of this case, for this Court to express its views on this question.

We have dealt in this brief with the one question which the Court specifically defined in its order of June 1, 1948, and with several other questions which are suggested by the pending motion for leave to proceed *in forma pauperis.* We have proposed answers to some of those questions. In examining the available materials, however, we were impressed by the generally haphazard manner in which applications for leave to resort to the *in forma pauperis* procedure have been disposed of by the federal courts. Of course, under any conditions, such applications would have to be dealt with on an *ad hoc* basis, but it seems to us that the courts and needy litigants

would be immeasurably aided by the formulation in general court rules of a set of standards which, though flexible enough to protect the rights of the indigent, might enable the courts to handle their applications for leave to proceed as poor persons with a dispatch and a degree of confidence not now evident in their determinations. The adoption of such standards, however, might well await a comprehensive study of the entire procedure in its day to day workings. The Administrative Office of the United States Courts would seem to be particularly qualified to make such a study.

Respectfully submitted.

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OCTOBER 1948.

APPENDIX

1. The Act of July 20, 1892 (c. 209, 27 Stat. 252; as amended June 25, 1910, c. 435, 36 Stat. 866; June 27, 1922, c. 246, 42 Stat. 666; January 31, 1928, c. 14, Sec. 1, 45 Stat. 54; 28 U. S. C. (1946 ed.) Secs. 832–836) read as follows:

> That any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal: *Provided,* That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct

that the expense of printing the record on appeal be paid by the United States, and the same shall be paid when authorized by the Attorney General.

SEC. 2. That after any such suit or action shall have been brought, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and willful false swearing in any affidavit provided for in this or the previous section shall be punishable as perjury is in other cases.

SEC. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

SEC. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

SEC. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided,* That the United States shall not be liable for any of the costs thus incurred.[1]

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[1] Effective September 1, 1948, these provisions were repealed and their substance incorporated in Section 1915 of the new Title 28 of the United States Code, which reads as follows:

"§ 1915. Proceedings in forma pauperis:

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen

2. Section 16 (b) of the Fair Labor Standards Act of 1938 as originally enacted (June 25, 1938, c. 676, § 16 (b), 52 Stat. 1069; 29 U. S. C. (1946 ed.) 216 (b)) reads as follows:

> Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of compe-

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who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

"(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of furnishing a stenographic transcript and printing the record on appeal, if required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

"(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

"(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

"(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases and if the United States has paid the cost of a stenographic transcript for the prevailing party, the same shall be taxed in favor of the United States."

tent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.[2]

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[2] As to actions commenced on or after May 14, 1947, these provisions were amended by the Portal-to-Portal Act of 1947 (May 14, 1947, c. 52, § 5 (a), 61 Stat. 87) to read as follows:

"Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

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